

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-4137

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

JOINT APPENDIX

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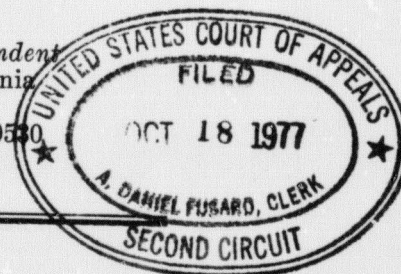
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**Certified List of the Occupational Safety
and Health Review Commission**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

GENERAL ELECTRIC COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
OCCUPATIONAL SAFETY AND HEALTH	)	No. 77-4137
REVIEW COMMISSION,	)	
	)	
Respondent.	)	

CERTIFIED LIST OF THE OCCUPATIONAL SAFETY
AND HEALTH REVIEW COMMISSION

The Occupational Safety and Health Review Commission, by its Executive Secretary, certifies that the list set forth below constitutes a full and accurate transcript of the entire record of a proceeding had before said Commission and known upon its records as OSAHRC Docket No. 11344. This transcript includes the pleadings, testimony and evidence upon which the order of the Commission in said proceeding was entered, and includes also the findings and order of the Commission.

VOLUME I Exhibits introduced into evidence:

Secretary's (Complainant's) Exhibits 1 thru 35

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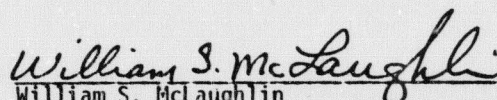
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IN TESTIMONY WHEREOF, the Executive Secretary of the Occupational Safety and Health Review Commission, being duly authorized by the Occupational Safety and Health Review Commission, has hereunto set his hand and affixed the seal of the Occupational Safety and Health Review Commission in the City of Washington, District of Columbia, this 25th day of August 1977.



William S. McLaughlin
Executive Secretary
Occupational Safety and Health
Review Commission

(SEAL)

4a
Certified List
COURT NO. 77-1137

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of
GENERAL ELECTRIC COMPANY
OSAHRC Docket No. 11344

11/18/74	Secretary's Citation, dated
11/18/74	Secretary's Notification of Proposed Penalty, dated
12/10/74	Employer's Notice of Contest, dated
1/2/75	Secretary's Complaint, dated
1/13/75	Union's Request for Expedited Proceedings, dated
1/16/75	Employer's Opposition to Request for Expedited Proceedings, dated
1/17/75	Employer's Answer and Motion for Order Directing Secretary of Labor to Answer Interrogatories, dated
1/30/75	Employer's Demand for Jury Trial, dated
2/3/75	Employer's Amended Answer, dated
2/5/75	Commission's Order on Request for Expedited Proceedings, dated
2/10/75	Administrative Law Judge's Order on Motion Directing Secretary to Answer Interrogatories, dated
2/11/75	Employer's Motion for Reconsideration on Motion for Expedited Proceedings, dated
2/12/75	Administrative Law Judge's Notice of Hearing, dated
2/19/75	Employer's Request for Continuance of Hearing, dated
2/21/75	Secretary's Motion to Strike Demand for Jury Trial, dated Employer's Memorandum of Law, undated
2/26/75	Employer's Motion for Reconsideration of Judge's Order of 2/10/75, dated
2/28/75	Secretary's Answers to Interrogatories, dated
3/5/75	Administrative Law Judge's Order on Demand for Jury Trial, dated
3/5/75	Administrative Law Judge's Order on Motion for Reconsideration, dated
3/5/75	Employer's Motion Direction Secretary to Supplement Answers to Interrogatories and Postponement of Hearing Date, dated
3/10/75	Employer's Motion for Order Granting Partial Summary Judgment and Memo in Support Thereof, dated
3/10/75	Commission's Ruling on Motion for Continuance of Hearing, dated
3/11/75	Administrative Law Judge's Order Rescheduling Hearing, dated
3/11/75	Secretary's Request for Admissions, dated
3/12/75	Administrative Law Judge's Order on Motion Directing Secretary to Supplement Answers to Interrogatories, dated

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Certified List

3/14/75	Commission's Ruling on Employer's Motion for Reconsideration, dated
3/14/75	Secretary's Reply to Motion for Partial Summary Judgment, dated
3/19/75	Employer's Reply Memo in Support of Motion for Partial Summary Judgment, dated
3/21/75	Employer's Answers to Interrogatories, dated
3/24/75	Administrative Law Judge's Order on Motion for Partial Summary Judgment, dated
3/26/75	Employer's Reply to Request for Admissions, dated
3/31/75	Hearing Opened
3/31/75	Hearing Closed
4/1/75	Hearing Opened
4/1/75	Hearing Closed
4/2/75	Hearing Opened
4/2/75	Hearing Closed
4/3/75	Hearing Opened
4/3/75	Hearing Closed
4/4/75	Hearing Opened
4/4/75	Hearing Closed
4/21/75	Hearing Opened
4/21/75	Hearing Closed
4/22/75	Hearing Opened
4/22/75	Hearing Closed
4/23/75	Hearing Opened
4/23/75	Hearing Closed
4/24/75	Hearing Opened
4/24/75	Hearing Closed
6/13/75	Employer's Brief, Proposed Findings of Fact and Conclusions of Law, dated
6/16/75	Secretary's Brief, dated
6/16/75	Union's Post Hearing Brief, dated
8/6/75	Administrative Law Judge's Decision and Order, dated
8/11/75	Union's Petition for Review, dated
8/18/75	Commissioner's Cleary's Direction for Review, dated
8/27/75	Employer's Petition for Discretionary Review, dated
11/6/75	Employer's Brief, dated
11/17/75	Union's Brief, dated
11/19/75	Secretary's Brief, dated
5/19/77	Commission's Decision, dated

**Secretary's Citation for a Willful and/or Repeated
Violation, Dated November 18, 1974**

112 State Street Room 1120A
Albany, NY 12207

CITATION

B-6439	87	7
AREA	REGION	
0050	2	

RECEIVED

NOV 20 1974

S. B. WALCZYK

3. Citation Number

4. Page 1 of 5. 1

TO: 2.

General Electric Company
1 River Road
Schenectady, New York 12345

6. TYPE OF ALLEGED VIOLATION(S): Willful and/or Repeated

7. An inspection was made on October 1, 2, 4 1974 of a place of employment located at:

8. Same as above

and described as follows

9. A workplace where electric devices are manufactured

On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, in the following respects:

10. Item number	11. Standard, regulation or section of the Act allegedly violated	12. Description of alleged violation	13. Date by which alleged violation must be corrected
1.	29 CFR 1910.23(c) (1) Page 23509, dated June 27, 1974	In building 81, Bay C18, a work platform 10' 11" above floor level over the dip and bake ovens was with- out a standard railing around the entire exposed edge to prevent the employees who perform maintenance on the motors and fans from falling over the exposed edge. In building 85, Bay D43, a crane access platform ap- proximately 19' above floor level was not provided with a toe board to prevent tools or other materials from falling into an employee work area below.	NOV 29 1974

The law requires that a copy of this citation shall be prominently posted in a conspicuous place at or near each place that an alleged violation referred to in the citation occurred. The citation must remain posted until all alleged violations cited therein are corrected, or for 3 working days*, whichever period is longer.

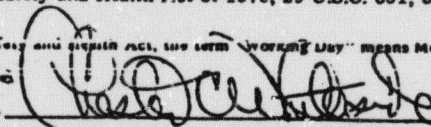
RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by submitting a letter to the U.S. Department of Labor at the address shown above within 15 working days* of the issuance of this citation.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11(c) (1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, 660(c)(1).

*Under the Occupational Safety and Health Act, the term "working day" means Mondays through Fridays but does not include Saturdays, Sundays, or Federal Holidays.

14. Area Director's Signature


Issuance Date November 18, 19 74

(NOTICE: Additional Important Information On Reverse Side)

7a

**Employer's Notice of Contest,
Dated December 10, 1974**

GENERAL  ELECTRIC

GENERAL ELECTRIC COMPANY

ONE RIVER ROAD

SCHENECTADY, N. Y. 12345

ROLAND C. RADICE, COUNSEL

STEAM TURBINE-GENERATOR PRODUCTS DIVISION

December 10, 1974

Mr. Chester C. Whiteside
Area Director
U.S. Department of Labor
Occupational Safety & Health Administration
203 Midtown Plaza
703 East Water Street
Syracuse, New York 13210

Re: Notice of Contest
CSHO No. B-6439

Dear Sir:

On November 19, 1974 General Electric Company's Small AC Motor and Generator Department received by mail a group of citations and associated notification of proposed penalty, all of which are dated November 18, 1974, with regard to certain facilities located at 1 River Road, Schenectady, New York. All of these documents bore CSHO No. B-6439. A copy of each citation and notification of proposed penalty is attached.

This communication shall serve as written notification to you in accordance with the provisions of the Occupational Safety & Health Act of 1970 and regulations promulgated thereunder that General Electric intends to and hereby contests before the Occupational Safety & Health Review Commission the following citations and notifications of proposed penalty in the manner indicated below:

- A) Contest citation and notification of proposed penalty associated therewith.

Citation Number 1, Item Number 1, 6, 10, & 12 Paragraph One
Citation Number 2, Item Number 1
Citation Number 3, Item Number 1
Citation Number 5, Item Number 1
Citation Number 6, Item Number 1
Citation Number 7, Item Number 1
Citation Number 8, Item Number 1 Paragraphs One & Two
Citation Number 9, Item Number 1
Citation Number 10, Item Number 1 Paragraphs Three & Four
Citation Number 11, Item Number 1 Paragraphs One & Two

1974 DEC 12 AM 9:06
CSHO DEPT OF LABOR
REC'D - SCHAFFNER

Employer's Notice of Contest

Mr. Chester C. Whiteside

Page 2

December 10, 1974

Citation Number 12, Item Number 1 Paragraphs One & Two
Citation Number 13, Item Number 1 Paragraphs One & Two
Citation Number 15, Item Number 1
Citation Number 16, Item Number 2
Citation Number 17, Item Number 1
Citation Number 18, Item Number 1

B) Contest Citation

Citation Number 1, Item Number 3, 5, 7, & 11
Citation Number 4, Item Number 1
Citation Number 14, Item Number 1

C) Contest Notification of Proposed Penalty

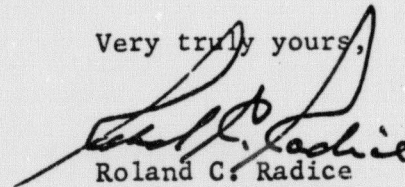
Citation Number 10, Item Number 1 Paragraphs One & Two

It should be noted that due to the limited scope of the Rules of the Occupational Safety & Health Review Commission, the above contest is set forth broadly so as not to waive any rights of General Electric Company in this matter. The specific nature of the contest of General Electric Company with respect to certain of the enumerated contested citations will be set forth in the answer of General Electric Company to the Secretary of Labor's complaint.

This notification is postmarked within fifteen (15) working days of the receipt by General Electric Company of the above-mentioned citations and Notification of Proposed Penalty.

As indicated on the attached sheet a copy of this Notice of Contest is being served on the Unions which represent employees of the General Electric Company at its various 1 River Road Schenectady facilities whether or not they might be affected directly or indirectly by the matters covered in said citations.

Very truly yours,



Roland C. Radice

Attorney for General Electric

RCR/bjn
Attachments

cc: Area Director
U.S. Department of Labor
Occupational Safety & Health Administration
112 State Street, Room 1120A
Albany, New York 12207

(continued)

9a

Secretary's Complaint

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

PETER J. BRENNAN, SECRETARY OF LABOR :
UNITED STATES DEPARTMENT OF LABOR,

v. : OSHRC DOCKET

GENERAL ELECTRIC COMPANY : NO. 11344

Respondent

INTERNATIONAL UNION OF ELECTRICAL, RADIO:
AND MACHINE WORKERS, LOCAL 301, PLUMBERS
AND STEAMFITTERS, LOCAL 128, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, LOCAL 294,
PATTERN MAKER'S LEAGUE OF NORTH AMERICA :
IFPTE, LOCAL 147 and INDEPENDENT
ASSOCIATION OF GUARDS AND PLANT PROTECTION
EMPLOYEES, LOCAL 1

Authorized :
Employee
Representative :

C O M P L A I N T

Inspection has disclosed that, at the times and
in the manner hereinafter stated, the provisions of the
Occupational Safety and Health Act of 1970 (84 Stat. 1590,
29 U.S.C. 651, et seq.), hereinafter referred to as the
Act, and the Occupational Safety and Health Standards
promulgated thereunder (29 C.F.R. Part 1910) have been
violated. It is, therefore, averred and charged that:

I

Jurisdiction of this action is conferred upon the
Occupational Safety and Health Review Commission by section
10(c) of the Act.

IV

As a result of an inspection by an authorized representative of the complainant, respondent corporation was issued one citation for twelve (12) violations, two (2) citations for serious violations, four (4) citations for willful and/or repeated violations and seven (7) citations for repeated violations on November 18, 1974 pursuant to section 9(a) of the Act.

V

On October 1, 2, and 4, 1974 at respondent's workplace located at One River Road, Schenectady, New York, the respondent violated the following Occupational Safety and Health Standards

10a
Secretary's Complaint

II

The respondent, General Electric Company a corporation organized under the laws of the State of New York and doing business in the State of New York maintaining an office and place of business at One River Road, Schenectady, New York is and at all times hereinafter mentioned was engaged in the manufacture of electrical machinery and equipment.

III

Many of the materials and supplies used by respondent corporation were manufactured outside the State of New York and the respondent corporation was and is engaged in a business affecting commerce within the meaning of sections

bay D17, East entrance door #15 was obstructed by dock bumpers, burning apparatus and other materials rendering the door inoperable for full instant use in the event of fire or emergency.

4) 29 C.F.R. 1910.37(q) (5) in that in building 81, bay d6, the way to the means of egress was not clearly marked so that the employees in the area would be directed to the nearest means of egress in the event of fire or other emergency.

5) 29 C.F.R. 1910.107(b) (9) in that in building 81, bay B34, a clear space not less than 3 feet wide on all sides of the paint spray booth was not kept free from stored materials to provide access for cleaning and prevent the accumulation of flammable materials.

6) 29 C.F.R. 1910.108(q) (5) (iv) in building 81, Bay D18 the cover on the dip tank that contains a flammable varnish was not closed when the tank was not in use and exposed

11a
Secretary's Complaint

promulgated pursuant to section 6 of the Act:

1) 29 C.F.R. 1910.22(c) in that in building 81, bay C-9, at the rear of Bliss Punch Press #52-250-72-60, the floor opening for the conveyor was unguarded and exposed the employees in the area in the hazard of tripping or having an extremity enter into the conveyor opening.

2) 29 C.F.R. 1910.23(d) (1) (ii) in that in building 81, bay C4, the 4 step stairway affixed to the side of the Niagara Separating Press #74802 was not provided with a standard railing on the exposed side to prevent the employee observed working on the stairway from falling over the exposed edge.

3) 29 C.F.R. 1910.36(d) (1) in that in building #85 bay D21, Exit entrance door #15 was obstructed by a

Secretary's Complaint

the employees in the area to the hazard of fire from the broken electrical conduit on the adjacent dip tank.

7) 29 C.F.R. 1910.157(d) (3) (iv) in that in building 81, Bay C3, a Kidde CO2 fire extinguisher mount on a jib crane did not have a durable tag securely attached to show the maintenance of recharge date and the initials or signature of the person who performs this service.

8) 29 C.F.R. 1910.157(a) (6) in that in building 81, Column A38, the top of a 10 pound capacity CO2 fire extinguisher was found to be installed at a height greater than 5 feet above the floor. In addition, in building 81, Column A35, a Kidde Fire extinguisher was found installed at a height greater than 5 feet above the floor.

9) 29 C.F.R. 1910.215(a) (4) in that in building 81, Bay C7, a pedestal offhand grinder was found with an opening between the tool rest and the wheel of more than one half inch into which work could be come jammed there by subjecting the operator to injury.

10) 29 C.F.R. 1910.252(a) (2) (v) (b) (9) in that in building 85, Bay A7, in the punch press area a fuel gas cylinder without a fire resistant shield was found within 9 feet of an actual cutting operation from which sparks or hot slag could reach the cylinder and cause a fire or explosion.

11) 29 C.F.R. 1910.252(d) (2) (ii) in that in building 85, Bay A7, in the Punch Press Area, no suitable fire extinguishing equipment was available for instant use near a cutting operation

13a
Secretary's Complaint

that had a two inch thick piece of lumber supporting the channel being cut and that had a fuel gas cylinder within nine feet.

12) 29 C.F.R. 1910.176(a) in that in building 81, bay A16, casting area, the aisles were not appropriately marked to indicate a definite path of travel for the powered industrial trucks used in the area. In building 81, Bay C34, the aisle used by powered industrial trucks was partly obstructed by pallets of components stored in the aisle. In Building 81, Bay A12, pallets of material were stored so as to partially obstruct the aisle used by powered industrial trucks.

VI

The violations alleged in the citation as set forth in paragraph V (1) through (12) were violations within the meaning of section 17(c) of the Act and had a direct and immediate relationship to the safety and health of the employees on the work site.

VII

On October 1, 2, and 4, 1974 at respondent's workplace at One River Road, Schenectady, New York the respondent violated the following standards promulgated pursuant to section 6 of the Act:

1) 29 C.F.R. 1910.132(a) in that in Building 81, Bay A14, the aluminum casting area, the employees who operate the melting furnaces and perform casting were not provided with suitable personal protective equipment to protect them from the hazard of molten metal and related heat.

2) 29 C.F.R. 1910.212(a)(3)(ii) in that in Building

14a
Secretary's Complaint

81, Bay A18, the insulation and cutting department, the point of operation of the radial cutoff was not guarded to prevent the operator from putting her hands into the point of operation while cutting insulation and other material.

VIII

The violations alleged in the citations as set forth in paragraph VII above was a serious violation within the meaning of section 17(k) of the Act in that there was a substantial probability that death or serious physical harm could result from the condition alleged to exist and respondent, knew, or could with the exercise of reasonable diligence have known, of the presence of the violation.

IX

On October 1, 2, and 4, 1974 at respondent's workplace at One River Road, Schenectady, New York the respondent violated the following standards promulgated pursuant to section 6 of the Act:

1) 29 C.F.R. 1910.179(j)(2)(v) in that in Building 81, Bay A33, near the test area, there was a two foot wire rope bridle that had two knots and showed signs of excessive wear that could cause failure of the sling and injury to an employee. Upon request the employer failed to produce signed monthly inspection reports for slings, nor was there any indication of a daily inspection of slings or other load attachment devices.

2) 29 C.F.R. 1910.212(b) in that in Building 81, Bay A18, near the insulation cutting and storage area, the Radiac cutoff machine, in its permanent location, was not securely

15a
Secretary's Complaint

anchored to prevent walking or moving that could endanger the employees who operate the machine.

3) 29 C.F.R. 1910.309(a) adopting the National Electrical Code, NFPA 70-1971, Article 400-4(2), Page 184 in that along the west exterior wall in the south-west corner of building 81, Bay A2 two flexible cords were run through holes in the wall and thus exposed the employees to the hazards of shock either from the 220 volt line to the carbon dioxide storage tank or the other line which carried 110 volts.

4) Section 5(a)(1) of the Occupational Safety and Health Act (29 U.S.C. 654(a)(1)) in that the employer did not provide employment and a place of employment that was free from recognized hazards in that an employee was permitted to work with and was observed placing a piece of steel stock weighing approximately 350 pounds in a Warner and Swasey Lathe #48620, in building 89, Bay 33 East. Two of the four jaws used to hold the stock in place were cracked. Failure of one or both of the cracked jaws would subject the employee operating the lathe and other employees in the area to the hazard of the flying broken jaws or the flying piece of stock.

X

The violations alleged in paragraph IX were willful violations within the meaning of section 17(a) of the Act (29 U.S.C. 666(a)) in that respondent had received notice from the employee representative's safety officials that the violative conditions existed and the respondent did not abate said violative conditions prior to the inspection by the Occupational Safety and Health Administration.

16a
Secretary's Complaint

XI

On October 1, 2, and 4, 1974 at respondent's workplace at One River Road, Schenectady, New York the respondent violated the following standards promulgated pursuant to section 6 of the Act:

1) 29 C.F.R. 1910.23(c)(1) in that in Building 81, Bay C18 a work platform 10' 11" above floor level over the dip and bake ovens was without a standard railing around the entire exposed edge to prevent the employees who perform maintenance on the motors and fans from falling over the exposed edge. In building 85, Bay D43, a crane access platform approximately 19' above floor level was not provided with a toe board to prevent tools or other materials from falling into an employee work area below.

2) 29 C.F.R. 1910.176(b) in that in building 81, Bay 17, rotor storage area, rotors weighing 40 to 60 pounds were stacked approximately 6 feet high in an unstable manner. It was easy to sway a stack with light hand pressure against the stack. The unstable material storage exposed the employees in the area to the possible hazard of falling material.

3) 29 C.F.R. 1910.309(a) adopting the National Electrical Code, NFPA 70-1971, Article 110-17(a), page 16 in that in building 81, Bay B16, in the casting area, the conduit was broken loose and the conduit box lacked a cover and thus exposed the employees to the hazard of contact with energized electrical parts because said equipment had not been guarded or isolated. IN building 81, Bay B16, on casting pot #2, employees were exposed

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to the hazard of contact with energized electrical parts due to a loose cover on a junction box which was not guarded or isolated. In Building 81, Bay A30, employees were exposed to the hazard or contact with energized electrical parts because doors on the rear of a 110 volt rectifier panel #MIM-90082 were open leaving the inner electrical parts unguarded and not isolated. In building 81, Bays 15-6, in the furnace area, employees were exposed to the hazard of contact with energized electrical parts because six "reactrol" door (zones 1-6) of the anneal oven 110 volt control panel were open leaving the inner electrical parts unguarded and not isolated.

4) 29 C.F.R. 1910.309(a) adopting the National Electrical Code NFPA 70-1971, Article 400-4(a), Page 184 in that in building 81, Bay C8, stator index press area, flexible cord was used as a substitute for the fixed wiring of a structure as was observed in the connection of ten stator index presses by flexible cord run to the 550 volt electrical supply panel. With such use of flexible cord there is a chance of press operators receiving an electrical shock.

In building 81, Bay A17, insulation cutting and storage area, a fixed location Walker-Turner cutoff was connected by a flexible cord, plug, and receptacle rather than by fixed wiring. Such a means of hooking up a machine exposed the operator to the hazard of electrical shock.

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XII

The violations alleged in the citations as set forth in paragraph XI above were willful and/or repeated violations within the meaning of section 17(a) of the Act (29 U.S.C. 666(a)) in that respondent had received notice from the employee representative's safety officials that the violative conditions existed and the respondent did not abate said violative conditions prior to the inspection by the Occupational Safety and Health Administration. In addition respondent had been previously cited for violations of these standards and all these citations have become final orders of the Occupational Safety and Health Review Commission and as such are not subject to review by any court or agency.

XIII

ON October 1, 2, and 4, 1974 at respondent's workplace at One River Road, Schenectady, New York the respondent violated the following standards promulgated pursuant to section 6 of the Act:

- 1) 29 C.F.R. 1910.22(a)(1) in that in building 81, Bay 16 adjacent to the rotor storage and casting areas the floor blocks were loose, the concrete floor was damaged and constituted a tripping hazard to the employees in the area. In building 89, Bay 3 East, pallets of parts, boxes of parts and bar stock stored on the floor between the machines constituted a tripping hazard to the employees in the area.

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2) 29 C.F.R. 1910.36(b)(3) an employee observed working in building 81, Bay C8, was exposed to the hazard of excessive travel to an exit. The employee would have had to travel an excessive distance along the way of exit approach to reach the nearest exit. An employee observed working in building 85, Bay C28, was exposed to the hazard of excessive travel to an exit. The employee would have had to travel to an exit. The employee would have had to travel an excessive distance along the way of exit approach to reach the nearest exit.

3) 29 C.F.R. 1910.133(a)(1) in that in building 81, Bay B16, adjacent to the casting area an employee was observed chipping on aluminum castings with an air utilization device. The employee was not provided with a suitable eye protection device to protect him from the hazard of flying aluminum particles.

4) 29 C.F.R. 1910.176(c) in that in building 81, Bay A18, an accumulation of coils of wire that constituted a tripping hazard for employees in the area were observed on the floor adjacent to the insulation storage racks.

5) 29 C.F.R. 1910.212(a)(1) in that in building 81, Bay A18-19, the insulation cutting and storage area, a rotating wheel on the insulation taper was within 2 inches of the operator's abdomen which exposed the employee to the hazard of a rotating part.

6) 29 C.F.R. 1910.157(a)(2) in that in building 81, Bay A11, a 10 pound capacity Kidde CO2 fire extinguisher mounted on an office wall was obstructed by a table, pallets

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of material and a waste container and was not readily accessible and immediately available to the employees in the area in the event of fire.

7) 29 C.F.R. 1910.252(b)(4)(ix)(c) in that in building 81, Bay B3 in the fixed welding area a rotor welder cable had five inches of ground wire exposed due to damaged insulation. Such an exposure of wire could cause an injury to the employees due to electrical shock.

XIV

The violations alleged in paragraph XIII were repeated violations within the meaning of section 17(a) of the Act (29 U.S.C. 666(a)) in that respondent had been previously cited for violations of these standards and all these citation except for those described in paragraph XIII (6) and (7), have become final orders of the Occupational Safety and Health Review Commission and as such are not subject to review by any court or agency.

XV

On November 18, 1974 a notification of proposed penalty for the citation was served on the respondent corporation, proposing a penalty of \$22,045.00. In determining the amount of the proposed penalty, due consideration was given to the size of the business of the respondent corporation, the gravity of the violations, the good faith of the employer and the history of previous violations, as required under section 17(j) of the Act.

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XVI

On December 12, 1974 pursuant to section 10(c) of the Act the respondent corporation filed with a representative of the Secretary of Labor, a notification of intent to contest the aforesaid citations other than those listed in paragraph V(2), (4), (8) and (9) and paragraph XI(3) subparagraphs 1 and 2. Respondent also contested the proposed assessment of penalty for all citations other than those listed in paragraph V(3), (5), (7) and (11), paragraph IX(1) and paragraph XIII(3). The notification of intent to contest was duly transmitted to the Occupational Safety and Health Review Commission and jurisdiction of this proceeding is conferred upon the commission by section 10(c) of the Act. The citation items and the proposed penalties noted above which were not contested have become a final order of the Review Commission by operation of law and as such are not subject to review by any court of agency.

XVII

Several of respondent's employees are affected by the violations reflected in the citations and complaint herein. The authorized employee representatives of the affected employees are the Plumbers & Steamfitters Local 128, International Union of Electrical Radio and Machine Workers, Local 301, International Brotherhood of Teamsters, Local 294, Pattern Maker's League of North America, & IFPTE, Local 147 and the Independent Association of Guards and Plant Protection Employees, Local 1. At all times relevant the said local unions were certified as the collective bargaining representatives of the affected employees of the respondent corporation and at all times relevant herein

Secretary's Complaint

they have had collective bargaining agreements with the respondent corporation.

WHEREFORE, the aforesaid citation and proposed penalty should be affirmed.

/s/ William J. Kilberg
WILLIAM J. KILBERG
Solicitor of Labor

/s/ Francis V. LaRuffa
FRANCIS V. LA RUFFA
Regional Solicitor

/s/ Theodore T. Gotsch
THEODORE T. GOTSCH
Attorney

U.S. DEPARTMENT OF LABOR
Attorneys for PETER J. BRENNAN
SECRETARY OF LABOR

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Employer's Amended Answer,
Dated February 3, 1975
UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

PETER J. BRENNAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

V.

GENERAL ELECTRIC COMPANY

Respondent

OSHRC DOCKET NO. 11344

INTERNATIONAL UNION OF ELECTRICAL, RADIO
AND MACHINE WORKERS, LOCAL 301, PLUMBERS
AND STEAMFITTERS, LOCAL 128, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, LOCAL 294
PATTERN MAKERS' LEAGUE OF NORTH AMERICA
IFPTE, LOCAL 147. and INDEPENDENT
ASSOCIATION OF GUARDS AND PLANT PROTECTION
EMPLOYEES, LOCAL 1

Authorized
Employee
Representative

AMENDED ANSWER

Now comes the General Electric Company, Respondent in the above entitled matter, by its Attorneys for its amended answer to the complaint upon information and belief denies the allegations contained in the opening paragraph of the complaint under the heading COMPLAINT and alleges upon information and belief with respect to the other allegations in the complaint as follows:

I

Respondent admits paragraph I of the complaint.

II

Respondent in response to paragraph II of the complaint admits that it is a corporation organized under the laws of the State of New York and doing business in the State of New York. It admits that it maintains an office at One River Road, Schenectady, New York and that it maintains several

Employer's Amended Answer

establishments at One River Road, Schenectady, New York engaged in the manufacture of many products including turbines, generators, various types of electric motors, gas turbines, tubes and castings and consists of components representing 18 divisions and 60 departments or operations at department levels. Respondent denies each and every allegation conformed in paragraph II of the complaint.

III

Respondent admits paragraph III of the complaint.

IV

Respondent admits paragraph IV of the complaint.

V

Respondent denies each and every allegation contained in the introductory paragraph of paragraph V of the complaint and as to the subparagraphs contained in paragraph V answers as follows:

1. Respondent denies each and every allegation contained in paragraph V, subparagraph 1 of the complaint.
2. Respondent admits the allegations contained in paragraph V, subparagraph (2) of the complaint.
3. Respondent denies each and every allegation contained in paragraph V, subparagraph (3).
4. Respondent admits the allegations contained in paragraph V, subparagraph (4).
5. Respondent denies each and every allegation contained in paragraph V, subparagraph (5).
6. Respondent denies each and every allegation contained in paragraph V, subparagraph 6 of the complaint.

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7. Respondent denies each and every allegation contained in paragraph V, subparagraph (7) of the complaint.
8. Respondent admits the allegations contained in paragraph V, subparagraph (8) of the complaint.
9. Respondent admits the allegations contained in paragraph V, subparagraph (9) of the complaint.
10. Respondent denies each and every allegation contained in paragraph V, subparagraph (10) of the complaint.
11. Respondent denies each and every allegation contained in paragraph V, subparagraph (11) of the complaint.
12. Respondent denies each and every allegation contained in the first sentence of paragraph V, subparagraph (12) of the complaint. Respondent admits the allegations contained in the second and third sentence of paragraph V, subparagraph (12) of the complaint.

VI

Respondent denies each and every allegation contained in paragraph VI of the complaint except as to those allegations admitted by the Respondent in paragraph V of the Amended Answer.

VII

Respondent denies each and every allegation contained in the introductory paragraph of paragraph VII of the complaint and as to the subparagraphs in paragraph VII answers as follows:

1. Respondent denies each and every allegation in paragraph VII, subparagraph (1) of the complaint.
2. Respondent denies each and every allegation of paragraph VII, subparagraph (2) of the complaint.

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VIII

Respondent denies each and every allegation contained in paragraph VIII of the complaint.

IX

Respondent denies each and every allegation contained in the introductory paragraph of paragraph IX of the complaint and as to the subparagraphs under paragraph IX answers as follows:

1. Respondent admits the allegations contained in paragraph IX, subparagraph (1) of the complaint.
2. Respondent denies each and every allegation contained in paragraph IX, subparagraph (2) of the complaint.
3. Respondent admits the allegations contained in paragraph IX, subparagraph (3) of the complaint but, as more fully set forth in the answer to paragraph X, denies that said violation was a willful violation.
4. Respondent denies each and every allegation contained in paragraph IX, subparagraph (4) of the complaint.

X

Respondent denies each and every allegation contained in paragraph X of the complaint except as to those allegations admitted by the Respondent in paragraph IX. Further, although Respondent admits the allegations contained in paragraph IX, subparagraph (3) of the complaint, Respondent denies that said violation constituted a willful violation.

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XI

Respondent denies each and every allegation contained in the introductory paragraph of paragraph XI of the complaint and as to the subparagraphs of paragraph XI of the complaint answers as follows:

1. Respondent denies each and every allegation contained in paragraph XI, subparagraph (1) of the complaint.
2. Respondent denies each and every allegation contained in paragraph XI, subparagraph (2) of the complaint.
3. Respondent admits the allegations contained in the first and second sentences to paragraph XI, subparagraph (3) of the complaint. Respondent denies each and every allegation contained in the third and fourth sentences of paragraph XI, subparagraph (3) of the complaint.
4. Respondent denies each and every allegation contained in paragraph XI, subparagraph (4) of the complaint.

XII

Respondent denies each and every allegation contained in paragraph XII of the complaint.

XIII

Respondent denies each and every allegation contained in the introductory paragraph to paragraph XIII of the complaint and as to the subparagraphs under paragraph XIII, Respondent answers as follows:

1. Respondent denies each and every allegation contained in paragraph XIII, subparagraph (1) of the complaint.

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2. Respondent denies each and every allegation contained in paragraph XIII, subparagraph (2) of the complaint.
3. Respondent admits the allegations set forth in paragraph XIII, subparagraph (3) of the complaint but, as more fully set forth the answer to paragraph XIV of the complaint, the Respondent denies that said violation was a repeated violation.
4. Respondent denies each and every allegation set forth in paragraph XIII, subparagraph (4) of the complaint.
5. Respondent denies each and every allegation set forth in paragraph XIII, subparagraph (5) of the complaint.
6. Respondent denies each and every allegation set forth in paragraph XIII, subparagraph (6) of the complaint.
7. Respondent denies each and every allegation set forth in paragraph XIII, subparagraph 7 of the complaint.

XIV

Respondent denies each and every allegation set forth in paragraph XIV of the complaint. Further, although Respondent admits the allegations set forth in paragraph XIII, subparagraph (3) of the complaint, Respondent denies that said violation constituted a repeated violation.

XV

Respondent denies each and every allegation contained in paragraph XV of the complaint except that it admits that Respondent's Small AC Motor and Generator Department on November 19, 1974 received a notification of proposed penalty which totaled \$22,045.

Employer's Amended Answer

XVI

Respondent admits each and every allegation contained in paragraph XVI of the complaint. Further, Respondent did not in its notice of contest contest paragraphs II and III of Citation number 1, item 12. Therefore, the first sentence of paragraph XVI of the complaint should note that Respondent does not contest the allegations set forth in the second and third sentences of paragraph V, subparagraph (12) of the complaint. In addition, while Respondent contests the classification of the alleged violations set forth in paragraph XIII, subparagraph (3), as indicated in paragraph XIV of this Amended Answer, it does not contest the amount of the penalty.

XVII

Respondent denies each and every allegation contained in the first sentence of paragraph XVII of the complaint except as to those citations which the Respondent does not contest. Respondent admits to the remaining allegations set forth in paragraph XVI of the complaint.

AS A FIRST DEFENSE TO THE COMPLAINT:

Matters alleged in the complaint in the underlying citations did not constitute a violation of the Occupational Safety and Health Act of 1970 (84 Stat. 1604, 29 USC 651, et seq.) as the standards cited are unreasonable and inconsistent with other standards contained in 29 CFR 1910 etc.

AS A SECOND DEFENSE TO THE COMPLAINT:

Matters alleged in the complaint in the underlying citations do not constitute a violation of the Occupational Safety and Health Act

Employer's Amended Answer

of 1970 as the citations and standards incorporated in the complaint are so vague and ambiguous and lack particularity so as to fail to conform with Section 9 (a) of the act and further are so vague and ambiguous as to be unconstitutional.

AS A THIRD DEFENSE TO THE COMPLAINT:

The matters alleged in the complaint and in the underlying citations do not constitute a violation of the Occupational Safety and Health Act of 1970 as the citations and standards incorporated in the complaint are so unreasonable as to be unconstitutional.

AS A FOURTH DEFENSE TO THE COMPLAINT:

Standards referred to in the complaint and its underlying citations are beyond the purview of the Occupational Safety and Health Act of 1970.

AS A FIFTH DEFENSE TO THE COMPLAINT:

Matters alleged in the complaint and in the underlying citations do not constitute a violation of the Occupational Safety and Health Act of 1970 as the citations and standards incorporated in the complaint and as applied to the facts are so vague and ambiguous and lack such particularity as to be unconstitutional.

AS A SIXTH DEFENSE TO THE COMPLAINT:

Matters alleged in the complaint and in the underlying citations do not constitute a violation of the citations and standards incorporated in the complaint are so unreasonable as applied to the facts in this case as to be unconstitutional.

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AS A SEVENTH DEFENSE TO THE COMPLAINT:

The penalties proposed are arbitrary and capricious and thus unconstitutional and void.

AS AN EIGHTH DEFENSE TO THE COMPLAINT:

The penalties proposed fail to properly consider the statutory criteria as required in the 17 (j) of the Act.

AS A NINTH DEFENSE TO THE COMPLAINT:

Abatement periods contained in the complaint are unreasonable.

AS A TENTH DEFENSE TO THE COMPLAINT:

The Occupational Safety and Health Act of 1970 (84 Stat. 1590, 29 U.S.C. 651, et seq.) is constitutionally void in that the methods and procedures for the enforcement of said Act violate Respondent's rights under Article 3 of the Constitution of the United States of America as well as the Fourth, Fifth, Sixth, and/or Seventh Amendments to said Constitution.

AS AN ELEVENTH DEFENSE TO THE COMPLAINT:

The complaint fails to state a claim upon which relief can be granted.

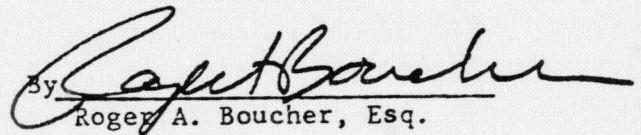
WHEREFORE Respondent demands that the complaint and the underlying citations except as to those parts of the complaint and citations which the Respondent does not contest and the proposed penalties except as to those penalties which Respondent does not contest be dismissed and

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that the Commission grant to this Respondent such other further and different relief as the justice of the cause may require.

Roland C. Radice, Esq.

By 
Roger A. Boucher, Esq.

Attorneys for the Respondent

Schenectady, New York
February 3, 1975

summary of what the language is.

JUDGE CRONIN: I think you ought to rephrase your question, Mr. Gotsch.

MR. GOTSCH: Your Honor, perhaps we could have the Reporter read back the question before the initial objection.

(The Reporter read back the previous question.)

JUDGE CRONIN: Do you understand the question, Mr. Bernard?

THE WITNESS: Yes, sir, I do.

JUDGE CRONIN: Very well.

THE WITNESS: Such tools would be removed or the jaws would be removed from service.

MR. JERUM: The same objection, Your Honor. It is just an opinion, not supported by expertise.

JUDGE CRONIN: Overruled.

Q All right. Mr. Bernard, at this point I am going to go on to Citation No. 8, and this has to do with the alleged violation of 1910.23 (c).

A May I refresh my recollection from the documents that I used here today?

Q All right. Just a moment.

(Hanging. Reading.)

Q I believe I indicated 1910.23 (c) (1).

All right, this particular standard pertains to the protection of open-sided floors, platforms and runways. This standard states, "Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing or the equivalent as specified.

"(e)(3) of this section on all open sides except where there is an entranceway, ramp, stairway or fixed ladder. The railing shall be provided with a toe board wherever beneath the open sides persons can pass, there is railing equipment or there is equipment with which falling material could create a hazard."

Now, of course, the standard railing required by Section (e) --

JUDGE CRONIN: I don't think that is necessary to read, Mr. Gotsch.

Q Mr. Bernard, with respect to this citation, could you relate to the court your observations that led you to charge an alleged violation of this standard?

A Yes, sir. There is an area on top of the dip and bake ovens in Building 81, Bay C-18, which I would consider to be a work platform, and part of the exposed edge was not guarded by a standard railing,

the exposed edge over which an employee might fall.

Q All right. Could you describe this dip and bak oven and the work platform that you found?

A Well, it is an oven to which some of the involved -- in the work process, in the production of the small AC motors which after the product is dipped in the varnish, it is then put in there for -- to dry, and to remove the vapors and heat, and prevent -- there are motors -- there are fans, and there are motors to dry the fans on top of the ovens.

Q You stated that you considered this to be a work platform?

A Yes.

Q What duties would be performed on top of this dip and bake oven?

A Maintenance on the two motors that I believe were to dry the fans, and some other apparatus in the ovens.

Q Where were these motors located?

A On this platform.

Q And this is on top of the dip and bakeoven?

A Yes, sir.

MR. BOUCHER: Your Honor, I would object to the previous testimony as to the work performed on top of these ovens, unless there is some

foundation laid for it.

JUDGE CRONIN: Would you lay a more detailed foundation?

MR. GOTSCH: Yes, sir.

Q Mr. Bernard, you discussed maintenance operations. How did you learn that maintenance operations were conducted on these particular motors?

A Discussion with the employer representatives.

Q The employer representatives?

A Yes.

Q Who were these representatives, Mr. Bernard?

A Just one moment, please.

That would be Mr. Guilbault and Mr. Sweeney.

Q All right. And what --

MR. BOUCHER: May I ask what the witness has just referred to?

JUDGE CRONIN: To what have you referred?

THE WITNESS: Work sheets.

MR. BOUCHER: The reason I ask is that my work sheets do not indicate any employer representative, and I thought they were the same.

I would like to make sure that we are referring to the same document.

JUDGE CRONIN: He said he referred to his

work sheet, and at this point that is his representation. That is sufficient, Mr. Boucher.

Now, whether you have it on your work sheet or not, it is not important at this particular time.

MR. BOUCHARD: I understand that, Your Honor.

The reason I raise the question is that Mr. Gotsch indicated to me that these were the work sheets which Mr. Bernard was using, and I would --

JUDGE CRONIN: You can explore that further at another point.

MR. BOUCHER: Certainly, sir.

Q All right. Mr. Bernard, you indicated that two of the employer representatives were present at that time.

A Yes.

Q And who were they again, sir?

A Mr. Guilbault and Mr. Sweeney.

Q And what discussions did you have relative to the -- to this work platform on top of the dip and bake oven with these two representatives?

A Well, there was a permanent -- There was a discussion regarding the railing that guarded part of the

perifry of the work platform.

Q All right. What did you state to them at that time?

A That I thought it was very poorly constructed, and that just putting your hand on it, you could shake it, and that it should have extended around the entire perimeter.

MR. BOUCHER: I object to the portion about the railing that was in existence. We are not cited, as I understand it, for the condition of the railing which was in existence.

JUDGE CRONIN: He was asked about his discussions, and he is testifying as to his discussions.

I will overrule your objection.

Q All right. Mr. Bernard, could you continue with your discussion, what you discussed with management representatives?

A That I thought that the railing was very flimsy in its construction, it was a metal railing, and by putting one hand on it, I could shake the railing back and forth. I said words to the effect that I doubted this might even hold me, that the fact that if I were to fall against it, maybe the railing might come down. I felt that it should have been guarding

the entire perimeter.

As I previously stated, there were two motors up there, and if an employee were to enter into the area, he might be able to perform maintenance on one of the motors and associated equipment from the area that was guarded by the railing, but to reach the second one, he would be in an area that was not guarded by the railing.

Q All right. About how long did this railing -- how long was the railing that you did observe on this dip and bake oven?

A I would say about 8 to 10 feet.

Q All right. And how much additional space was there that you considered was required?

A I would say about 10 to 14 feet.

Q In addition?

A Yes.

Q What was the configuration of this area on top of the dip and bake oven?

A Somewhat like an L.

Q All right. Could you give us the dimensions, to the best of your recollection?

A Well, the vertical part of the L would be about 12 feet and the lower part would be about 10 feet.

Q All right. At which portion was the railing that you previously alluded to?

A On the upper part, the vertical part of the L.

Q And how did you reach this surface?

A There was a fixed metal ladder.

Q And where did this ladder lead to, which portion of this surface?

A The upper part of the vertical part of the L shape.

Q Was that the section that the railing was in place?

A Yes.

Q And where were these motors located?

A Well, about four feet from the bottom of the L in the vertical part and the other one would be located at the extreme end of the horizontal, the farthest end of the horizontal part of the L.

Q All right. Which one of these motors had -- Well, which one of these motors was adjacent to the railing, such as there was?

A The one about four feet from the bottom of the L.

Q And what was the location again of the other motor?

A All the way at the end of the horizontal end, the farthest end from the ladder.

Q All right. Now, what response did the management

representatives make to you after your comments to them?

A I am sorry, I do not recollect.

Q Your discussion again was that you considered the railing to be inadequate; is that correct?

A Yes, I did.

Q Now, you discussed the maintenance on these motors. How did you determine that maintenance was performed on these motors?

A Well, we discussed the fact that they had put up part of the railings part of the way, that there was a permanent ladder to provide access, and that someone would certainly have to go up there periodically to perform maintenance on the motors. There did not seem to be any disagreement on that point.

Q Well, who made the statement that maintenance had to be performed on the motors?

A Well, I did. It was in the discussion with the employer representatives that they had put the railing up there to protect the employees for that purpose of going up there, this was the ultimate discussion.

MR. BOUCHER: Your Honor, along this line

of testimony, I would again object to any testimony as to maintenance. The witness stated that it was in fact his statement that maintenance was performed.

JUDGE CRONIN: Well, if I remember correctly, Mr. Boucher, he testified that he raised the subject that maintenance was being performed, and that the response was yes, that is why we put the railing up.

MR. BOUCHER: I am sorry, perhaps I misunderstood him or did not hear him clearly. If I could hear that response again --

JUDGE CRONIN: Do you want to read back what his response was, Mr. Reporter?

(The Reporter read back the last question and answer.)

MR. BOUCHER: I am sorry, Your Honor, it is not clear to me exactly who said that that was the purpose of the railing.

JUDGE CRONIN: Do you recall who said that? If you don't recall, just say you don't recall.

THE WITNESS: Well, I am not absolutely sure. I think it was Mr. Sweeney.

MR. BOUCHER: Thank you.

JUDGE CRONIN: Your original objection is overruled.

Q All right. Now, Mr. Bernard, how did you determine this work platform was 10 feet, 11 inches from the --

A I measured it with a steel tape.

Q All right. How did you measure that?

A Well, there was a -- I hooked the end of the tape, there is a device at the end of it like a hook to assist in measuring, and I hooked that on this platform, the metal platform, and I touched the tape to the floor surface.

Q All right. Now, what was the area around the dip oven, what type of area was on ground level?

A Concrete.

Q Concrete. What type of activity was conducted in this area?

A Well, there would be the employees, their access going to and from the area around the bake oven. Along, as I described it, as the vertical part of the L, there was a manually propelled conveyor in that area.

Q All right. Mr. Bernard, was there any other condition that you observed at this time that led you to cite this particular citation?

* * * * *

A That was the only one that I observed.

Q And these tools that were in use on the bridge of the crane, how close were they located to the area of the crane access platform?

MR. BOUCHER: Objection. I don't think there has been any testimony about tools being in use on the bridge.

JUDGE CRONIN: I will sustain it as to the form.

MR. GOTSCH: All right.

Q Mr. Bernard, you did testify that tools were found near the motor on the bridge.

How close was this motor and tools to the area of the access platform?

A Probably, I would say, about 20 to 25 feet.

Q Now, Mr. Bernard, what type of citation did you recommend be cited for this particular alleged violation, the 1910.23 (c)(1)?

A Willful and/or repeated.

Q All right. Could you tell us how you computed the proposed penalty for this particular violation?

A Well, on the basis of the hazard in Building 81, Bay-C18, the work platform that did not have the proper guarding or have guarding on the perimeter, I

felt that if an employee were to fall over this exposed edge, he would suffer serious physical harm, possibly death. This I concluded should receive the maximum penalty of \$1,000.

There is also the degree of willfulness involved. There is also the fact that they were repeated violations.

So I used the factor of 2 for willfulness and I also used the factor of 2 as per the compliance instructions in the Compliance Operations Manual for a repeated violation.

This left me with a total factor of 4, and I multiplied the adjusted penalty of the \$900 by 4.

Q All right. Mr. Bernard, you discussed the willful aspect in your opinion of this violation.

How did you arrive at that?

A The fact that the employees stated that they brought this matter to the attention of the responsible representatives of the employer.

MR. JERUM: I am sorry, did you testify in the answer to the preceding question that an employee could fall off the platform?

THE WITNESS: An employee --

MR. JERUM: That an employee could fall off

* * * * *

jaws?

A Not if it were rotating, no, sir.

Q And it was not rotating; is that correct?

A No, sir, it was not.

Q And there was nothing in it; is that correct?

A That is correct.

Q And it was just coincidence that there was nothing in this lathe at the time you happened to come across it?

A I would say so, yes.

Q Now, I would like to turn, as I noted before, to citation 8, the first sentence of which in the complaint, -- which is subparagraph one of paragraph ~~22~~, which states, "In building 81, Bay C-18, a ~~work~~ platform ten feet eleven inches above floor level over the dip and bake ovens was without a standard railing around the entire exposed edge to prevent the employees who perform maintenance on the motors and fans from falling over the exposed edge."

This work platform that you are referring to in the citation, this work platform is in fact the top of an even, is it not?

A Yes.

Q The top of a portion of an oven?

A Yes, sir.

Q And I think you stated that at the time of your inspection, there was a railing in place around part of that top of that oven; isn't that correct?

A Yes, sir.

Q Did you perform any test on that railing to determine how many pounds of pressure it could withstand before giving in or falling over?

A Only in the sense that I shook the railing, I put my hand on it and I moved it back and forth.

Q And if I put my hand on the top of this railing, which I know is in front of the jury box, I note it shakes back and forth also, is that correct, sir?

A Yes, sir.

Q Is that approximately where you placed your hand, on the top of the rail like that (Indicating)?

A Yes, sir.

Q And if I put my hands on this metal railing, which is immediately adjacent to you in the witness stand, and which is apparently a wrought iron railing bolted to the floor, I note it also shakes, does it not sir?
(Indicating)

A Yes.

Q And from doing that, can I determine how many pounds of pressure that railing can withstand?

A No.

JUDGE CRONIN: Let me ask at this point, is the railing that was up on the top of this oven, which went a portion of the edge, is that in issue or is it only the portion of the platform that had no railing on it at all?

MR. GOTSCH: Well, I think, your Honor, the whole edge of the dip and bake oven is in issue, that portion which, of course, had no protection and, in addition, there was a portion where there was protection which may not have been

adequate.

JUDGE CRONIN: The only reason I asked the question is it says, "Without a standard railing around the entire exposed edge."

Now, was it the compliance officer's intention to claim that the entire edge right around that platform was in violation or just that portion of the platform where the railing did not exist?

THE WITNESS: Just where the railing did not exist.

JUDGE CRONIN: In view of his statement, that other railing there is not at issue; is that correct?

MR. GOTSCH: Well, I take it then that was the reason that this citation was issued.

All right, I would agree, your Honor, that only that portion where no protection was present, that is the

basis of the Secretary's citation -- of this particular item of this particular citation.

JUDGE CRONIN: Since it is not in issue, Mr. Boucher, can we move along?

MR. BOUCHER: Certainly.

Q Did you determine what type of employee would be on top of this even if anyone?

A I was my assumption that it would be a maintenance employee.

Q There were no controls on top of this oven for the operation of the oven?

A No, sir.

Q So there was no reason to assume that the oven operated would be up there?

A No.

Q Just maintenance employees?

A Yes, sir.

Q Did you determine the frequency that such maintenance employees might go on top of this oven?

A I did not.

Q Regardless of that frequency you felt that the

top of this oven was a work platform?

A Yes, sir.

Q If such maintenance employees were to go on the top of this oven once a year for maintenance purposes, would that be sufficient to make it a work platform?

A Yes, sir, it would.

Q If such employees were to go on top of this oven once every two years, would that be sufficient to make this a work platform?

A Yes.

Q Five years?

MR. GOTSCH: Your Honor, I would object. Again, I believe the witness testified he could not determine how many-- how often the employees went up there, and I think that these various periods of time just calls for a very speculative answer.

JUDGE CRONIN: Well, of course, he is being examined as to his particular interpretation of whether it is a platform. I think it is an appropriate line

of questioning.

I will overrule your objection.

Q I think the question, Mr. Bernard, was what if a maintenance man or person, assuming such people do go on top of this oven, what if this person was on top of that oven for maintenance purposes, but only once every five years.

Is that sufficient to make the top of this oven a work platform?

A Yes, sir.

Q Is there any outside limit that you would consider this thing is not a work platform?

A None.

Q Is it a fact that sooner or later that somebody must go up there that makes it a work platform?

A Yes, sir.

Q Isn't that true of probably everything within a work site, that sooner or later it is going to decay or sooner or later it is going to need some maintenance and sooner or later somebody is going to have to go up there?

A Yes.

Q Is everything in the work area -- for example, an exposed beam, a structural beam across an opening --

A Yes.

Q -- if there is some reason for an employee to have to go up there for maintenance, that is a work platform and must be guarded?

A Some precautions will be taken to protect the employee.

Q What precautions?

A Safety belts.

Q In some cases you can use safety belts. Is that for maintenance employees?

A It is for anyone.

Q Anyone. Could safety belts have been used in this instance?

A Yes, sir.

Q Would safety belts have satisfied you?

A Yes, sir, they would have.

Q But I think the standard says that if it is a work platform, it must be railed; isn't that correct?

A That is correct.

Q Well then, if you can use safety belts, then I assume this is not a work platform; is that correct?

A No.

Q It is not correct?

A It is not correct.

Q Well, excuse me if I am confused, sir, but I thought you stated just before that safety belts would have been sufficient?

A It would be an alternative means of protecting the employee.

Q Would they have been sufficient?

A Yes.

Q This standard, as I read it, 1910.23(c)(1) reads, "Every opened sided floor or platform four feet or more above adjacent floor or ground shall be guarded by a standard railing on all open sides --" and I have left out the parenthetical language --

Q -- "except where there is an entrance to a ramp, stairway or fixed ladder."

Was there an entrance to a ramp here?

A No.

Q To a stairway?

A No.

Q There was one to a fixed ladder, was there not?

A Yes, sir.

Q And that was not guarded?

A No.

Q It need not be guarded?

A No, sir.

Q That standard, as I understand it, if it applied to the top of this oven, does not have anything in it that I just read saying that safety belts may also be used?

A No, it does not.

Q Does it, sir?

A No, it does not.

Q Yet it was your expert opinion that safety belts, if used, would satisfy -- would be satisfactory for the maintenance personnel that go on top of this oven?

A Yes, it would have.

Q Isn't it obvious then that it is not a work

platform?

A Not by that line of reasoning, no.

Q Well, if the standard says work platform must have railings, and you are stating that this work platform, if it is that, the top of this oven did not need a railing, and that safety belts could be used as an alternative; isn't it obvious that the top of this oven is not a work platform?

A No.

Q Well, I ask you, sir, how could safety belts meet the requirement of this standard?

A They would fulfill the requirement of the standard in the sense that they would protect the employee from falling over the exposed edge.

Q I agree with you a hundred percent, sir, but the standard does not say utilize such devices as would protect employees from falling over the exposed edge.

The standard says there must be a railing.

A Right.

Q If it is a work platform?

A Yes.

Q If you are testifying as an OSHA inspector and as an expert, isn't it obvious or shouldn't it be obvious that if safety belts meet the requirements of this -- of protecting the employees, and would have been satisfactory in your expert opinion, that this could not be a work platform?

A I do not agree with your reasoning.

Q You do not agree, sir?

A No.

Q Will you explain for me, sir, please, why you feel that safety belts would not have been sufficient?

A The purpose of the standard is to protect the employees from falling off the exposed edge. Therefore, we have a standard that says that they will provide a standard railing. However, since something like a safety belt and the use of it depends too much on supervision and em-

ployee discipline, it is not generally utilized or accepted.

It would be accepted to me, if would be acceptable.

It is not generally ~~not~~. It is sort of a last resort.

Q The people that go on top of this oven, if anybody does, do they use safety belts?

A I do not believe they do.

Q And upon what is that belief based?

A It is an impression of the situation I have. I cannot explain any further than that.

Q So you don't know for a fact whether they do or they don't?

A No.

Q If safety belts were used by the employees that go on top of this oven, then there is no violation, is that your testimony?

A I would have to answer in the affirmative, yes.

Q So at the time you issued this citation, you did not know whether there was a violation

or not; is that correct?

A No.

JUDGE CRONIN: Did you make a determination as to how many employees went up on top of that platform for the purpose of maintenance work?

THE WITNESS: No, I did not, sir.

JUDGE CRONIN: And your conclusion that maintenance employees did go up there is based only on an assumption on your part?

THE WITNESS: Now, it is coming back to me now.

All right.

In the -- we had a conference on the Monday -- an extended closing conference, and -- with Mr. Beddows and someone else, I think maybe Mr. Miles was there up in our office in Syracuse, and this discussion came up about safety belts.

Well, if you can prove to me that the employees who do go up there utilize

safety belts, then you have the argument, and this is where it ended.

There was no offer of proof concerning this.

JUDGE CRONIN: That does not answer my question.

THE WITNESS: I am sorry, sir, I was --

JUDGE CRONIN: In other words, your clarification now was for Mr. Beucher's benefit?

THE WITNESS: Yes, I am sorry.

I get a little weary after all of this.

I was trying to explain the determination of people going up there.

They requested another conference to discuss abatement, what they could abate immediately, somethings in five days and somethings in ten days, and that sort of thing, and what they had abated.

And this came up about the railing

on top of the dip and bake oven, and there was a discussion about people going up there to perform maintenance, to which the reply came what if we gave them -- something about what if they used safety belts.

All right, if these maintenance people who do go up there, who may go up there --

JUDGE CRONIN: You were told that maintenance people did go up there?

THE WITNESS: The words from the employer representative were what if the maintenance people go up there and they used safety belts.

JUDGE CRONIN: That is the answer to my question.

You did make a determination then in that area?

THE WITNESS: Yes.

JUDGE CRONIN: Proceed, Mr. Boucher.

MR. BOUCHER: Fine.

Q And your answer was that safety belts would be sufficient?

A Yes.

Q Do you to this day --

A The answer to what, now?

Q Excuse me, safety belts would be sufficient?

A Yes.

Q To this day, do you know whether, prior to the inspection, safety belts were utilized by the employees who went on top of this oven?

A No.

Q So you assumed there was a violation?

A Yes, sir, from my discussions with Mr. Beddows.

Q Were any minutes taken during this meeting in Syracuse, any notes?

A MR. Taylor took a lot of notes. I don't know what became of them.

Q You haven't seen them since Mr. Taylor took those notes?

A I have seen them since, but it is along

time. I have accumulated --

Q Did you use them -- I am sorry --

A I have accumulated so many papers, I am not sure just where they are, if I have them.

Q Did you use them in refreshing your recollection as to what occurred at this meeting in Syracuse in preparation for your testimony here today?

A I doubt if I have looked at them since the day of the meeting.

Q But now -- you now remember exactly what was stated by Mr. Beddows at that meeting?

A Yes, sir, I do.

Q I think you stated there was a manually propelled conveyor at the base of one side of this oven; is that correct, sir?

A Yes, sir.

Q Was there any powered conveyor that you observed, that is, I mean a conveyor on which objects were moved due to the fact that the conveyor is moving?

A It may have been manually propelled -- I mean, a power conveyor, I did not have ec-

casion to inspect it closely.

Q Turning to the penalty and the classification, sir, you first -- first, to the classification, Inote this is marked or cited as a willful and/or repeated?

A Yes, sir.

Q Is that correct?

A Yes, sir.

Q Could you tell me for my edification where in OSHA, as passed by the Congress and signed by the President, there is a notification -- there is set forth a classification of aviolation labeled willful and repeated?

A It is not that I know of.

Q There is none that you know of?

A Either/or, but not both.

Q Thereis one for willful; is that correct?

A Yes.

Q And there is one for repeated; is that correct?

A Yes, sir.

Q But there is none in the Act that says willful

* * * * *

Q In the first place I note this railing -- excuse me, this alleged work platform is noted is on page two of attachment 2A and --

A One moment, please.

Q Do you have that, sir, it follows --

A Yes, I see it now, thank you.

Q And it reads, "In the special dip and bake area there is a cat walk that is ten feet eight inches above the floor. There are no top rails, mid rails or toe boards. An additional hazard is presented by the moving conveyor beside this."

Did you see a catwalk on top of this oven?

A I would characterize it as such.

Q Was the entire top of this oven a catwalk?

A No.

Q It was a very specific area that was a catwalk?

A Yes, sir.

Q Did you consult with anyone before deciding to cite the top of this oven as a work platform?

A Consult with anyone?

Q Yes, anybody else in your office, with Mr. Taylor, with anybody, before you made the decision this was a work platform? Did you consult with anyone?

A I discussed it with Mr. Taylor.

Q Could you tell me what this discussion entailed?

A No, I could not.

Q Well, did you tell Mr. Taylor, the top of that oven is a work platform?

A I cannot specifically say what I said regarding this particular violation. The only thing is that for weeks we worked on this, we talked about it. I am sure that I have discussed it with Mr. Taylor. I cannot recall the exact conversations.

Q Well, was there any conversation concerning a question regarding whether the top of this oven was a work platform?

A I don't think there was any at any time.

Q Neither one of you had any questions but that the top of this oven was a work platform?

MR. GOTSCH: Your Honor, I would

object.

JUDGE CRONIN: I think it is repetitive. I think he has answered the question.

MR. GOTSCH: I would also object to the relevance, your Honor.

The thought processes of Mr. Bernard, in arriving at the citation are not before the Court. It is whether the facts established in the citations that were issued.

JUDGE CRONIN: Well, he has given his opinion that the platform above this particular oven was a working platform as defined by the standard, and, therefore, he can be examined as to how he arrived at his conclusion that it was a work platform.

MR. GOTSCH: All right.

JUDGE CRONIN: You contest the validity, Mr. Gotsch, of a witness' opinion, and he has -- on direct examin-

ation he continually gave opinions, therefore, respondent's counsel has a right to test his opinion.

If he had not given his opinion on direct examination, then perhaps your objection would have merit.

I will overrule your objection.

Q Mr. Bernard, looking again at Exhibit 33, and this time attachment 3B, part two on page three --

A One moment, please.

I have it.

Q Do you have that, sir?

A Yes, sir.

Q All right.

I believe it was the first time Mr. Rooney's name is noted on this page, Mr. Rooney being the SAC representative, to this union -- at this union-SAC meeting, and Mr. Rooney is noted as stating, "On the 23(c)(1), we do not regard this as a catwalk."

Do you see that, sir?

A Yes, sir.

Q Was this the same catwalk we discussed before that you state you saw on top of the ovens? Would you assume that it was the same catwalk?

A Looking at this, without further perusing this document, I would say that it might apply to it.

Q If we turn to 8B, part four on page one thereof, --

A I have it.

Q -- this alleges to be a phone conversation received by Mr. Martucci from Mr. Rooney, Mr. Martucci being the union representative and Mr. Rooney, of course, being the SAC representative.

Mr. Rooney is noted as saying, "On 23(c)(1) we are going to put handrails up on a good faith basis. The rail is to be put on the edge of the oven as far as needed. About six feet on the number two oven."

Do you see that, sir?

A Yes.

Q We have discussed the railing as it was in existence at the time of your inspection; is that correct?

A Yes, sir.

Q And did this railing -- didn't this railing extend the length of the catwalk?

A The length of the catwalk, yes.

Q And was it in fact other portions of the even not encompassed by this catwalk that were not railed?

A That is correct.

Q What was it that made you believe that the company had not responded to the union's request?

A They had not put the -- they had not guarded the entire perimeter.

Q But wasn't the union's request as reflected in the union's own document that the catwalk needed to be railed?

A Yes.

Q The catwalk was railed at the time of the inspection, was it not, sir?

A Yes, sir.

Q Did the union tell you at any time that they had discussed any other part of the top of this oven?

A My recollection is that they did.

Q They did?

A Yes.

Q Your recollection is that they did?

A Yes.

Q Don't you find it strange that the union's own documents which purport to be the minutes of this meeting, these meetings between SAC officials and union officials refer only to catwalk?

A Yes, sir.

Q Didn't it occur to you that the only item the union was contending needed to be railed was the catwalk?

A It did not.

Q It did not occur to you at any time despite the continued use of the word catwalk?

A Yes.

Q Would it be possible for someone in the exercise of good faith to view the top of this

even as not being a work platform?

A It would be possible.

Q Did you take that into consideration in deciding on the classification of the citation?

A Yes, sir.

Q Didn't the employer representatives tell you that they did not view the top of this even as a work platform?

A Yes, sir.

Q Did you feel they were lying?

A No.

Q Did you think they were in good faith?

A I would have to regard it -- I had no reason to believe that they were lying.

Q Well, then I assume they were in good faith?

A All right.

Q You agree, sir?

A I agree.

Q You regard this alleged violation as willful, even though the employer representative, in good faith, believed that the standard did not apply?

A I would like to reflect on that for a moment, please.

Yes, I believe he is in willful violation.

Q Dispite everything I have mentioned?

A Yes.

Q This railing did extend and encompass the catwalk; is that not correct?

A That is correct,

Q Thank you.

Let us go to citation four assessing the penalty, I believe you stated you felt this was a serious violation?

A Yes, sir.

Q Do you have your worksheets, sir, page 43 of 41?

A Yes.

Q Doyou note on there, under (a) number and occupation of employees affected by appasent violation, one maintenance man?

A Yes.

Q Do you happen to know his name?

A No, sir, I do not.

Q Could it have been two maintenancemen?

A Yes, sir.

Q This is an assumption again on your part is one maintenance man?

A Well, yes, sir.

Q Mine has something crossed out on it, sir, and I cannot read it very well.

May I look at it on the original please?

A Of course.

(Handing. Reading.)

Q May I ask who was using a black felt tip pen when these were filled out, if you recall?

A I assume it is Mr. Taylor.

Q And who was using the blue felt tip pen at the time this was filled out?

A Mr. Taylor.

Q And who was using what appears to be a normal ballpoint pen?

A I am.

Q I note that most of them seem to have this variance in the types of pens used, sir, looking at your originals.

Is it possible that different parts of

.

Q And I.U.D. is what?

A International Union Department. It is sponsored by the union, the AFL-CIO.

Q Did this also pertain to OSHA?

A Yes, it did.

Q All right.

Now, Mr.Keast, you mentioned a meeting of August 1st, and you have heard all of the testimony in this particular hearing.

Were any of the violations that are still contest in this proceeding -- were any of these the subject of your meeting on August 1st?

A Yes.

Q Could you tell us which ones?

A Specifically 23(c)(1) is one of them, and 309(a), the use of flexible cord is another one, and at that time we also brought up the cracked jaws, 5(a)(1).

Q All right.

You stated that -- you testified just now that there was a discussion of the alleged violation of 1910.23(c)(1)?

Q What were your first observations of this particular condition?

A Well, on June 21st, the night that we made our initial inspection, we had -- we were over in that particular area, and there were several other conditions that we had observed at the time and we climbed up on top of this -- climbed the ladder, there was a fixed ladder outside of this oven, and we looked around up there, and determined that somebody had to go up there to repair those motors or service either a breakdown, or if the belts break up there, somebody would have to go up there to repair them.

It might be a machiner repair, and electrician or steel worker, if they were -- if there was anything to be repaired up there or anything of that nature.

Q And what was -- this was in building 81, Bay C18?

A That is right.

Q And what other -- what was the general description of that area in building 81?

A It is a dip and bake area, a special dip and bake area. They dip motors in the varnish,

and then they run them on a chain type conveyor through the oven, and the insulation is baked on.

Q And how many of these ovens did you observe there?

A There are three ovens there. There is the one oven right on the corner which contains, I believe, three varnish tanks. They are dipped in a series of these tanks, and then baked.

They circulate. The tracks go all around through them.

Q And did you make any observation with respect to these ovens?

A Well, not of the ovens, but the --

MR. BOURHER: I will object as to the relevancy of this particular line of questioning to the citation.

JUDGE CRONIN: What are you driving at at this point, Mr. Gotsch?

MR. GOTSCH: Well, I want to --

JUDGE CRONIN: Is there one oven involved in this citation?

* * * * *

rule the objection.

Q Could you tell us what you observed on June 21st with respect to the dip and bake ovens?

A Well, they all have similar type of equipment up on the top of them. They have motors, they have circulating motors. There are ventilation belts, some of them even have controls, hydraulic relays up on top, and they have to be serviced over a period of time.

Just exactly what the frequency is, I don't know, but I do know that our people without our bargaining unit that we represent have to go up there, electricians, plumbers, steelworkers and machine repair people, at one time or another, to work on these, whether it be to perform regular maintenance or on a breakdown, and we felt that these people that have to work up there should be provided with some type of guarding from falling off the top of these ovens when they are performing this work.

MR. BOUCHER: Your Honor, --

JUDGE CRONIN: Yes, Mr. Boucher?

MR. BOUCHER: -- the way I read the

complaint, paragraph nine, subparagraph nine, it refers to a work platform ten feet eleven inches, and on Mr. Bernard's direct examination and cross examination, the only thing I remember reference to was one particular oven.

Suddenly, I seem to find we are discussing three ovens.

JUDGE CRONIN: Well, that was my memory with respect to Mr. Bernard's testimony, that we only talked about one oven.

MR. BOUCHER: Yes.

JUDGE CRONIN: But if the citation reads ovens, of course, this witness can complement the testimony of Mr. Bernard.

MR. BOUCHER: Well, with that understanding, it may be necessary to recall Mr. Bernard now to determine exactly what the respondent was cited for.

It was my understanding that we were cited for one particular platform. I do note now that it says ovens in paragraph

* * * * *

and he testified to only one alleged work platform. I feel it is highly inappropriate at this time to attempt to amend the complaint after settlement negotiations have been discussed, and held.

MR. CHERTKOV: Objection. That has no relevancy on this issue.

MR. BOUCHER: Well --

JUDGE CRONIN: One at a time, please.

MR. BOUCHER: And now in view of all of that, to come back and allege three work platforms, I just most strenuously object.

JUDGE CRONIN: I am going to deny your motion to amend at this particular juncture in the proceeding, Mr. Gotsch.

So I would like you to have this witness' testimony restricted to the work platform that was testified to by Mr. Bernard.

Q Mr. Keast, you were present at the time of the inspection, were you not?

A Yes, I was.

Q Did you observe which work platform Mr. Bernard

A He went on the center of it. There are three in the area. There is -- depending on which way you look, if you look to the east side of the building, which would be from the back of two of these ovens, we were on the second one going north, the north direction of the building, and then the other dip and bake oven would be right on the inner section of the main aisle and across an aisle at the 18 line, the 18 frame, then across the building, which goes east to west.

Q So the platform that Mr. Bernard ascended was the center?

A Right.

Q Over the center of it?

A Yes.

Q All right.

And how would you describe the particular platform?

A It's dimensions are, I would say, about sixteen by twenty, approximately. I did not take any physical measurements for its total length or width.

Q I see.

And where was this located in the floor of the plant? Was it near a wall?

A No, right behind the back oven is a conveyor, and there are several ways that you can get to it, you can come from the main aisle or the 18th line aisle alongside the conveyor, or you can come directly in off the main aisle past the dip tanks, and you walk right straight in off from the aisle, right towards that oven.

Q All right.

And how would you reach the top of this oven?

A There is a fixed ladder on the back corner of the oven.

Q And on June 21, 1974, did you climb up this ladder?

A No, I did not.

Q Did you make any recommendations as a result of your observations on June 21st?

A We discussed it with Charles Mongin, and we told him that we -- it was a work platform, and that it should be guarded.

We read the standard to him as to guarding of work platforms, and their response was that nobody ever goes up there, and that they never work up there.

Q When you say --

MR. BOUCHER: Your Honor, I will move to strike the answer at least as to clarification.

First there is testimony that this witness did not go up on top of this oven. Next there is testimony that we, whoever we is, told somebody something, and next there is testimony that they or their response without any indication of any individual was something.

JUDGE CRONIN: Well, I think it all goes back to this meeting that they had with Mr. Mongin and the other representative of management, and I take it that you-- the witness has been discussing what was told to Mr. Mongin at this particular time.

you know all of those who were

present, and certainly you can pursue this on cross examination.

Overruled.

MR. BOUCHER: Thank you.

Q All right.

Your discussion with Mr. Mongin concerned how many of these platforms?

A The three of them.

Q And what was the -- was it Mr. Mongin who responded to you?

A Yes.

Q And what did he say?

JUDGE CRONIN: I think he just stated that, Mr. Gotsch.

MR. GOTSCH: All right.

Q Mr. Keast, as a result of this meeting on August 1st, what further action did the union safety committee take? When was the next time that you looked into the matter?

A Well, it was not until around September the 4th that we made a reinspection, and that was after a second meeting on August 29th with

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Matt Rooney and Mr. Flynn.

Q Who is Mr. Flynn?

A Somebody in union relations, I don't know his title.

Q All right.

And did you discuss this 1910.23(c)(1) condition with those two gentlemen on August 29th?

A Yes, I did.

Q And what was the discussion that the union safety committee had on that point?

A They responded to the 23(c)(1) violation by stating that --

Q Well, wait a minute, what was your discussion, first?

A Well, we asked them what they had done and their response -- Mr. Rooney --

Q How did they respond to that?

A Mr. Rooney's response to us was that they did not consider that a work platform, but they would put a partial rail about six feet, on it, as a good faith effort, which they did do.

We were still not satisfied.

We felt that the oven should have been guarded properly by a full rail, a standard railing, all the way around it, where people work, and we -- he wanted us to point it out to him, and we left that meeting that day on the 29th, and we pointed it out to Mr. Rooney, who accompanied us out on the floor, to look at that specific oven, and we also pointed out the other ovens in the area at that time.

Q You say Mr. Rooney wanted you to show him the oven?

A Right.

Q Was this before or after the partial railing had been put on?

A This was after the partial railing had been put up. He told us they put up a six foot partial railing on a good faith basis.

Q This was done prior to August 29th?

A Yes, it must have been during their shutdown in August.

Q And when you went out on the floor with Mr. Rooney, what was the safety committee's discussion

with him at that time?

A We pointed out to him that the railing was not adequate, that ~~that~~ should go the entire length and around the side of it, to protect the employee from falling while he was working up there.

Q How many sides did you consider needed guard rails?

A We felt three sides.

Q And what about the fourth side?

A There didn't seem to be any access to that fourth side because of the vents.

Q Because of the vents?

A Yes.

Q When you said there didn't seem to be any access, to whom?

A To the employees. He would not be able to work up there.

I did not go up on top of the platform.
The three sides where there could have been access to the employee working on there were the sides that we are particularly talking about,

and that was on the back and the north and south side. It would have been the west side of the oven, the north side and the south side.

Q All right.

And what did Mr. Rooney respond to you at this time?

A His response was that they did not feel it was a violation, and that they put that railing up there, that partial railing on it as a good faith basis, but he would go back and check on it.

Q And did you have any further occasion to inspect that particular area?

A Yes, on October 1st when we conducted the inspection.

Q And how did you find the area at that time?

A In the same condition as we did when we discussed it with Matt Rooney on the 29th of August, and also on our inspection of September 4th.

Q And when you say in the same condition, what was that?

A The six foot partial railing that was all that was there.

Q Was this one of the items that was part of this C-7 form that was filed with OSHA?

A Yes.

Q And did you bring this particular item to Mr. Bernard's attention?

A Yes, we did.

Q All right.

Mr. Keast, I would like to ask you about the turret lathes, and you have heard much testimony about this.

Was this particular item discerned by the safety committee during the summer?

A Yes, it was.

Q And when was the first time it came to your attention?

A On June 21, 1974, and when we wrote out our inspection report, we did not include it in that report.

Q Why was that?

A Because the inspection of building 81 was so large, and it took us such a long time to get the report out, that we omitted it and brought it up at the August 1st meeting with Mr. Rooney and

Charles Mongin.

We had asked Mr. Mongin if we would like to discuss other problems that we had in the other buildings.

JUDGE CRONIN: Mr. Boucher, interpose an objection at any point you would like.

MR. BOUCHER: Well, I wanted the witness to finish his answer.

The objection is based on the fact that we, us, I have no idea who "we" is, and I would just like a clarification.

JUDGE CRONIN: All right, Mr. Gotsch, would you lay a more specific foundation as to when the witness says we, if he could say who said what to whom.

MR. GOTSCH: All right.

Q Mr. Keast, first of all, you mentioned the inspection of June 21st, with respect to this lathe.

What was your observations, you, personally, at that time?

A On June 21st?

Q Yes, of the Warner-Swasey lathe?

.

the overhead, and then it was like draped from there to each machine, each machine had like a metal stanchion on it, and each line came running from one machine to the next, and to the next, on down the line.

I believe it was a parallel hookup. It looked like a parallel hookup, but each machine had a control box to it, but the main feeder line came from another column.

Q All right.

Now, Mr. Keast, one question on that 23(a)(1) violation involving the dip and bake over platform.

What --

MR. BOUCHER: You mean 23(c).

MR. GOTSCH: 23(c), excuse me.

Q What type of equipment was found on the dip and bake oven itself?

MR. BOUCHER: Again, your Honor, I would request a clarification in time.

MR. GOTSCH: In this case, we would assume that it would remain the same. How-

ever --

Q Based on the times you observed this dip and bake oven, what equipment was found on top of it?

A Two motors, you have drive belts, and your duct work for the ovens, your circulators.

JUDGE CRONIN: What is the purpose of that platform above the oven, if you know?

THE WITNESS: This is where the motors are installed. This is where the motors are held, up on top.

JUDGE CRONIN: Do they sit on this platform?

THE WITNESS: Yes.

MR. BOUCHER: Your Honor, I am not sure I understand your question. It is my understanding there isn't a platform, it is just a top of an oven. I'm not sure if that was clear or implicit.

What I mean is, there was nothing else over the top of the oven except the one very small area that could be constituted

as a --

JUDGE CRONIN: Well, this area that has been described in the testimony of Mr. Bernard, what was it?

THE WITNESS: It is the top of the oven.

JUDGE CRONIN: The top of the oven?

THE WITNESS: Yes.

JUDGE CRONIN: And this machinery is on top of the oven?

THE WITNESS: Yes.

JUDGE CRONIN: Is it an intricate part of the oven?

THE WITNESS: Yes, it is, it is a part of the oven. It is used to operate it. That is how they -- without it, they couldn't run it.

I suppose if you took the motors off and monitored them in some other location, you probably could use the oven, but in this case it was designed with these motors on top.

JUDGE CRONIN: So in your opinion, the purpose of this particular area was to hold the motors?

THE WITNESS: Right. Well, it had to be sealed. It served a dual purpose. One is to enclose the ovens for baking the motors after they are dipped in this varnish, and to stop the release of the heat you would have to have a top on it, and this is where they set their motors, up on top of it.

JUDGE CRONIN: So if you did not have the motors there, you would still have this cover or top; is that right?

THE WITNESS: That is right.

Q Do you know whether maintenance is performed on these motors?

A To my knowledge, yes, they have maintenance performed on them. If you have a breakdown, you would have to go up there and work on them.

MR. BOUCHER: Objection, it is speculative. No foundation has been laid.

JUDGE CRONIN: He indicated this is his opinion.

Q Mr. Keast, do you know if motors of this type can run indefinitely without maintenance?

A I doubt it.

MR. BOUCHER: I would request a foundation belaid. I would object because of the lack of a foundation.

JUDGE CRONIN: I think he has really indicated relative dirth and knowledge in this particular area, Mr. Gotsch, and --

MR. GOTSCH: All right, your Honor, I will go onto another point.

Q Mr. Keast, in building 81, Bay A18, the Radiac cutoff machine, did you observe this particular condition at the time of Mr. Bernard's inspection?

A Yes, I did.

Q And what did you see?

A I observed a woman cutting -- proceeding to cut insulation on a machine.

She was cutting -- they are insulating tubes for the connections inside of a motor, and they

.

A Yes.

Q You stated there was some seventy items on this original complaint or original list --

A Approximately seventy.

Q Which you allege you were handed or you allege was given to SAC management?

A Yes, they were in the possession of that document as of the August 1st meeting.

JUDGE CRONIN: Do you know that of your own knowledge?

THE WITNESS: Yes, I do, I was there.

Q Wasn't SAC trying to fix a number of those items on that list?

A That is what we were told, yes.

Q Turning to citation eight, paragraph one, which has to do with the motors on top of the oven, that is what this platform is, isn't it, it is simply the top of the oven?

A Yes.

Q You stated on direct that you did not climb up the ladder to this particular oven for which we were cited during your June 21, 1974 inspection; is that correct?

A That is correct.

Q When was the first time you were on top of that oven?

A I never said that I was on top of the oven.

Q Prior to the inspection, were you ever on top of that oven?

A No, I was not.

Q So prior to the inspection you did not know what was on top of that oven for a fact, did you?

A Yes, I do for a fact, because as a roving inspector I used to go all over that building.

Q You used to climb all over the top of ovens?

A I would go up and look. It was quite some time ago.

Q And how long ago is that?

A 1967.

Q What duties would a roving inspector have with regard to the top of that oven, this particular oven?

A No duties at all, Mr. Picher, none.

Q Yet it is your testimony that as part of your work as a roving inspector, you went on top

of that oven?

A I did not climb on top of the oven. I had been up there with another employee, showing me this operation.

Q Well, either you were on top of the oven or you weren't.

Did you go on top of the oven?

A I went on the ladder.

Q You were on the ladder beside it; is that what you are testifying to?

A That is right.

Q So when you stated on direct you left the meeting-- this is the meeting on August 1, I believe, with Mr. Rooney, to look at the top of the oven, it was not this oven, was it?

A Yes, it was.

Q Oh, I am sorry, I thought I asked you when prior to the inspection you went up there, and you testified back in 1967.

A I did not go up on top of the oven. I never testified that I did go up on top of the oven.

Q All right.

When you and Mr. Rooney went out there, Mr. Rooney stated, I believe you said, that we don't think that is a work platform?

A That is right.

Q Could you show us what you are talking about?

A That is right.

Q Did you go to this particular oven?

A Yes.

Q Did you go up on that oven?

A No, I did not.

Q Did you go up on the ladder?

A No, I did not.

Q Did Mr. Rooney go up on the oven?

A I don't believe so.

Q All right.

A I believe Larry went up on top of the oven and pointed it out.

Q That is Larry Rafferty?

A That is right.

Q All right. You stated that Rooney's response was that he did not feel this was a violation, but that he would put a railing up on a good

faith basis; is that accurate?

A That is accurate.

And, he also stated --

Q Well, let's just leave it at that is accurate for now.

When did Mr. Rooney make that statement, sir?

A After the August 1st meeting, and he also made a statement at the 29th meeting as well.

Q Did you doubt that he was telling you?

A That he put it up on a good faith basis?

Q No, no, did you think or did you doubt that Rooney really meant that was the top of an oven-- excuse me, a work platform, that the top of the oven was not a work platform?

A Wouldyou repeat that?

Q Do you think Matt Rooney really thought that the top of this oven was a work platform?

MR. GOTSCH: Your Honor, I will object. I think that is calling for --

A He --

JUDGE CRONIN: Overruled.

A He told us -- told me, in fact, that the only people that go up there are maintenance people.

Q That is not exactly my question, sir.

I am asking you when he told you I don't think that we, SAC considered that the top of this oven is a work platform, was he lying? Did he really think it was a work platform?

A I don't know. I don't know what he was thinking.

JUDGE CRONIN: Did Mr. Rooney state to you that maintenance people went up there?

THE WITNESS: Yes, he did.

Q You were present during these meetings of August 1 and August 29th?

A Yes.

Q Who took the minutes of those meetings for the union?

A Myself and Larry Rafferty and John Martucci.

At the August 1st meeting, John Martucci was also present, and Mr. Trinci.

Q Are those minutes, are they generally accurate of what was said?

A Pretty much so.

Q Well, as to the minutes of August 1st meeting -- excuse me, first of all, in your list, the union's list of items, I believe that is attachment 8-A to OSHA 7, and let me show you that.

I don't have exhibit 33, but is that the list that was drawn up specifically for your inspection on 6/21?

A Yes, that is the inspection that was made. That is the list, yes.

Q Your inspection was --

A That is part of it.

Q -- 6/21, and this is dated July 22nd?

A That is right.

Q So it was a month before the list was prepared?

A Yes.

Q Did some effort go into preparing this list?

A Yes, it takes quite a bit of time.

Q Could you tell us approximately how much time?

A Well, with the other duties that we had, it took us just about that long before we could get

it typed up. We had to rough it out, eliminate the items that standards did not apply to, make sure it was accurate, if we could.

Q You tried to make it as accurate as you could?

A Yes.

Q Well, on page two of that attachment, 8-A2 exhibit 33, it states, "23(c)(1): In special dip andbake area there is a catwalk that is ten feet eight inches above the floor. There are no top rails, midrails or toe boards. An additional hazard is presented by the moving conveyor beside this."

Did anybody go on top of that oven during this particular -- this particular oven during your inspection on 6/21/74?

A Just Larry Rafferty to my knowledge.

Q He went on top of this particular oven?

A Yes.

Q Now, it says catwalk.

I assume this is taken from Mr. Rafferty's notes, since you were not on top of it?

A There is a catwalk, you step down once you

get off up there, but that is all --

Q There is a catwalk?

A About six feet long, if you would call it that.

Q And Mr. Rafferty was complaining about the catwalk; is that correct?

A Yes.

Q The entire top of this oven is not a catwalk, I take it?

A No, it is not a catwalk.

Q Again in attachment 8-B, part one, on page two thereof, which are allegedly --attachment 8-B to exhibit 33, which is the OSHA 7, allegedly the minutes of the August 1 notes, it is alleged that Mr. Mongin stated, "We think we found the catwalk, but we need a clarification."

Is that what Mr. Mongin said?

A I believe so.

Q Again he is referring to a catwalk?

A Yes.

Q Was this catwalk included in your reinspection of September 4th?

A I believe it was, but I am not sure. I don't know for sure.

Q Would it surprise you that it was not?

I am sorry, did you give an answer?

JUDGE CRONIN: He asked you would it surprise you that it was not?

THE WITNESS: No, it probably would not.

Q Isn't it a fact that Mr. Rafferty is the only person that went on top of this particular oven; isn't it a fact that the only thing that he complained about to SAC officials was that portion of the top of this oven was considered to be a catwalk?

A No, that is not true.

Mr. Rafferty had several discussion with Mr. Rooney on that.

When he walked out there -- Mr. Rooney said that he did not feel that was a work platform, he would guard the catwalk. He stated that the only people that go up there are maintenance people, and the maintenance people don't work

on the catwalk.

Q That maintenance people work on the catwalk?

A They don't work on the catwalk.

Q Well, isn't it -- let me start over again.

The union's own minutes refer only to catwalks on the various meetings; isn't that correct?

A Yes.

Q Isn't it --it is also correct that the day -- on the day of the OSHA inspection there was a railing going to that portion of the top of this oven which had been a non-skid type surface on it? There was a railing on there, wasn't there?

A There was a partial railing, yes.

Q And that railing extended the length of what was the catwalk?

A Yes.

Q I am trying to find out, but I honestly -- perhaps it could be pointed to me by you, if you have S-33, where this catwalk is mentioned on the reinspection of September 4th.

A What is that again?

Q Perhaps you could point out to me on the reinspection of September 4, 1974, where that catwalk is mentioned?

A Well--

MR. CHERTKOV: Has the witness testified that it was mentioned?

JUDGE CRONIN: No, he has not.

MR. BOUCHER: That is correct, your Honor.

However, since this is a reinspection and the witness testified that he found many of the things that he found before, I think it goes to the fact of willful in showing that even though we did not feel that that particular -- the top of this oven, and the portion of it --

JUDGE CRONIN: I understand what you are driving at, Mr. Boucher, but this witness testified that he does not know if it is mentioned or not in the document, and of course, the document speaks for itself.

It is either there or it is not there.

MR. BOUCHER: Yes, your Honor, and I will withdraw the question.

JUDGE CRONIN: Mr. Keast, in your complaint that you gave to the company --

THE WITNESS: That is right.

JUDGE CRONIN: -- did it make any reference at all to the top of the oven in the vicinity of the motors?

THE WITNESS: No, it did not.

Q Mr. Keast, on 6/21, did you see anybody besides Mr. Rafferty on top of this oven?

A No.

Q Other than that time back in 1967 or 1968, had you ever seen anybody on top of this oven, and, of course, excluding the time when the OSHA inspectors were up there?

A No.

Q So your testimony that people must go up there to repair motors and maintain motors, that is purely speculation on your part, isn't it?

You don't --

A No.

Q You don't, in fact, know of your own knowledge of anybody other than the people doing the inspection for OSHA and Mr. Rafferty had ever been on top of that oven and excluding the time back in 1967?

A Your maintenance records would show --

Q No, sir, I am asking you do you know?

MR. CHERTKOV: Objection.

A No, I don't.

MR. CHERTKOV: I object.

JUDGE CRONIN: Let me interpose right at this moment.

In answer to a question that I asked him this afternoon, he stated that he was told by Mr. Rooney that maintenance people went on top of that oven.

Now, I would assume in all fairness, Mr. Boucher, that that forms some of the basis for his opinion that people go up there.

MR. BOUCHER: I was trying to establish whether he, for a fact --

JUDGE CRONIN: Well, he testified that he has not observed anyone up there.

I would think that is sufficient for your point.

MR. BOUCHER: All right.

Q What did -- exhibit 8-B, part one, again refer to additional hazards presented by the moving conveyor besides this, presumably the top of the oven.

Was that a power conveyor?

A On top of the oven?

Q No, it says alongside of it.

A Alongside of it, no, that is not a powered conveyor.

Q Did you know which oven Mr. Rafferty was referring to in this list?

A I believe I did.

Q Well, you stated there were three ovens?

A There are three ovens there.

Q All right.

111a

Keast-cross

4/21-187

Do you know which oven Mr. Rafferty was referring to?

A Yes, I do.

Q Did Mr. Rafferty only go on top of one oven?

A Yes.

Q Was it the same oven to which the citation refers?

A Yes.

Q Looking at citation eleven, which has to do with the use of flexible cable, you did not, I believe you testified, bring these ten Stator Index Presses to the attention of SAC management officials, did you?

A No, we discussed the use of flexible cable in general throughout the area.

Q These ten stator index presses, are they large machines?

A It depends on what you consider a large machine.

I consider the machine I work with in 273 larger. Those are large machines to me.

Q Would you describe the size of these individual

.

MR. GOTSCH: Yes, I do.

REDIRECT EXAMINATION

BY MR. GOTSCH:

Q Mr. Keast, with respect to the dip and bake oven, which you observed in June and in October, you stated that you did not climb to the top of the oven?

A That is right.

Q Now, how do you know what is located on top of the dip and bake oven?

A Well, if you walk around that area, you could look right up on top of it and you can see the motors and the belts.

I mean, you can step back ten, fifteen feet, and you can look right up on top of it.

I mean, you can see the motors, you can see the duct work and you could see the belts.

Q All right.

Now, with respect to the motors and catwalk that was described, where are these motors located with relationship to the catwalk?

A I would say -- once you get off the catwalk,

you walk maybe six or eight feet, and go east, and the motor, -- you just turn to your right and the motor would be about in the center of the oven itself, and they are side by side.

Q The motors are side by side?

A Well, you have one towards the edge, and then there is one a couple or three feet from the edge on the right side, if you were looking towards the edge from the back of the oven towards the front of it.

Q All right.

Now, you stated Mr. Rooney told you that nobody besides maintenancemen went to the top of this oven.

Do you recall when he made that statement to you?

A It was on the August 1st meeting, and I guess he also -- August 29th he made the statement, and he also made the statement again on the floor when we were on the floor, and I pointed it out to him.

Q And that was on the same day?

A Yes, I believe it was.

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and that is all I know.

Q Is it a division, was my question.

JUDGE CRONIN: And if you don't know,

just say so.

A I don't know.

Q All right.

MR. CHERTKOV: Well, is it, don't

leave us hanging.

JUDGE CRONIN: Please, gentlemen.

Q Do you know what division SAC is a part of?

A The AC Motor and Generator Division, the business division.

Q Now, when was the last time you worked in SAC, what year?

A I believe I stated 1968.

Q And in what building was that in?

A Well, I worked at that time -- before I went to 273, I worked out of the UC Office, in building 85, in the back part of the building.

Q And you haven't worked in SAC since that date?

A No.

Q Have you been in building 89 between 1968 and

1974?

A I conducted an election down there. I was a member of the election committee one year that we had board member and steward elections, and I walked through there, that's all.

Q Just walking through, you didn't work in there?

A No, no.

Q So your knowledge about parts being assigned to specific machines and cataloging, you don't know whether that is the current practice in SAC or not, do you?

A No, I don't.

Q You stated at the time of the inspection or on August 29th, there was a partial rail placed on top of this dip and bake oven?

A Yes.

Q And that ~~did~~ extend the length of this catwalk?

A Yes.

MR. BOUCHER: Nothing further, your Honor.

MR. GOTSCH: I have no further questions.

* * * * *

and returned either prior to Thanksgiving or Christmas, there were two courses, one was electrical, and I don't know which was which, but prior to Thanksgiving or Christmas, I went to a one-week course in New York for electrical compliance, given by OSHA personnel.

Actually, the in-plant experience as far as the two years I worked with Morse, is the bulk of it.

Q All right.

Mr. Taylor, you discussed some of your knowledge of maintenance procedures, and I would like to ask you, based upon your background as an in-plant engineer, whether or not it is usual for motors in a plant to be maintained from time to time?

A Well, usually with a motor you are not just talking about a motor, you are talking about mechanical equipment in addition, whether it be a pump or --

MR. BOUCHER: Your Honor, I am going

to object, unless this question is, is it usual in the plant in which this witness happened to work at that time.

He has not testified to any knowledge of any procedures in any other location.

JUDGE CRONIN: Of course, it would have to be limited to what his observation has been.

THE WITNESS: As I was saying, with a motor, you are usually going to have a pump or some other fixture, a generator, something of this nature, so you run into belts and pulleys and you run into couplings.

On the motor itself, you may have steel bearings for the life of the motor, or you may have bearings that have -- that could be lubricated every six months, or in one case, every month, depending upon what mode of lubrication, and usually the age of the motor.

Manufacturing and technological advances have come out with lifelong bearings at this point.

Motors do burn out, and they have to be replaced.

Like I say, the accompanying device or piece of machinery with the motor also have to be replaced, belts and pulleys have to be replaced, maintenance has to be done on the pump, on the fan, whatever it might be, so you cannot just say that the motor is going to require regular maintenance.

It will, in the whole system, require maintenance.

We kept on hand, I would say, in the neighborhood of approximately three dozen spare motors just for the fact that motors do wear out and bearings wear out.

Q All right.

Mr. Taylor, did you observe the dip and bake oven that was referred to in -- by Mr. Bernard in his testimony?

Taylor-direct

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A Yes, from the floor level.

Q And what were your observations of this particular structure?

A There was a fixed ladder on the -- I don't know how you would describe which side it was on, but it was the back corner, leading up to a railing on the side that would be ninety degrees to that, of approximately -- it looked to be approximately six feet in length.

The remainder of the perimeter was open.

Q Did you observe anything on top of this oven?

A I did not.

The initial discussion from what I recall was Mr. Bernard said something to me to the effect that he was going up to check a railing, and --

Q All right. That was that point.

Mr. Taylor, did you, based upon your observation of the oven, perceive any hazard to employees?

A Now, are you talking about the lack of a railing?

Q Well, whatever you observed that you considered to be a hazard?

A Well, there were two questions at the oven.

There was one of unguarded belts and pulleys and there was the question of the inadequate railing around the entire perimeter.

Q Why don't we limit ourselves to the railing that you -- or such as you observed?

A Assuming there are motors, or whatever structures there are up there--

MR. BOUCHER: Your Honor, I would object.

The answer is based upon an assumption of this witness.

JUDGE CRONIN: That is correct.

Sustained.

A If -- if for any purpose, someone was to go up on this platform, most definitely there is a hazard.

MR. BOUCHER: Again this is based upon an assumption.

JUDGE CRONIN: Well, it is an assump-

tion, but there are certain facts already in evidence.

I am going to permit it.

Q Well, Mr. Taylor, you said that you saw a fixed ladder on this oven; is that correct?

A Correct.

Q Now, what would this lead you to believe, given this fixed ladder?

A The usual procedure --

MR. BOUCHER: Your Honor, I don't see the relevance of that question.

JUDGE CRONIN: Mr. Gotsch, why don't you assume certain facts and ask him his opinion.

MR. GOTSCH: All right.

Q Mr. Taylor, you made note of the fixed ladder. Now, assuming an employee made use of this ladder and went to the top of the oven, what hazard did you perceive such an employee would be exposed to?

A Due to the height of the oven, any employee, whether it be that he backed off or accidentally

slipped and fell off to the floor below, would have sustained, depending upon how he hit, anything from maybe broken legs to death, depending on how he hit, naturally.

Q Now --

MR. GOTSCH: Your Honor, yesterday we had discussed the jaws, and at this time I would like them marked for identification and admitted into evidence.

Do you have any objection?

MR. JERUM: Can I see the jaws?

(Handing.)

JUDGE CRONIN: Would this be Exhibit 34 for the Secretaty?

THE REPORTER: Yes.

JUDGE CRONIN: They will be marked as S-34.

Is there any objection to their receipt into evidence?

MR. BOUCHER: No.

(Two jaws of a metal consistency -- received and marked in evidence as Exhibit

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4/22-74

operation in that machine?

A To begin with, you are referring to the Radiac Cutoff?

Q The Radiac Cutoff, yes.

A What we were looking for --

Q What you were looking for, sir?

A What a compliance officer would be looking for, or what I as a compliance officer --

Q What were you looking for? I think you testified as to what you were looking for.

A A guard that would adequately protect employees from the point of operation.

Q Well, some reasonable assurance; is that correct?

A Adequate.

Q On top of this oven --

A The dip and bake oven, you are referring to?

Q Yes, citation eight, paragraph one, didn't Mr. Sweeney -- you testified to something you thought you remember that perhaps Mr. Sweeney stated, and what you thought you remember that perhaps Mr. Sweeney stated was when any mainten-

ance people go on top of that oven, or something to that effect; is that correct?

A Something more to the effect that both pieces -- both machines are tagged out, locked out when any of our maintenance people are up there, working on them.

Q You are sure it was not if any of our maintenance people work on them?

A If any of our maintenance people go up there, they tag them out.

Q Well, if he --

A Are you saying that if any of our maintenance people?

Q Yes, that is my question.

A It could have been.

Q And you did not go up on top of that oven, did you?

A No.

Q You did not see anybody up there, other than your inspection party?

A Not that I recall.

Q So you don't have any personal knowledge whether

anybody in fact does go up there?

A I think that was established on the direct.

Q Well, I wish to reestablish it on cross.

Is it correct?

A Okay.

Q Now, this work platform, as you put forth in the citation -- just to establish it again, we are in fact, talking about the top of a piece of equipment, are we not?

A You mean the top of the oven as being the work platform?

Q Yes.

A Yes, we are referring to the working platform on top of the oven.

Q We are referring to the top of an oven, aren't we? It is alleged that the top of the oven is the work platform?

A Yes, it is alleged as such.

JUDGE CRONIN: Mr. Boucher, is it the respondent's position that nobody goes up on this oven?

MR. BOUCHER: Well, that may be the

respondent's position until proved otherwise.

JUDGE CRONIN: Well, to me a great deal of time has been taken up on this one particular point, and as far as I am concerned, it is really not a game.

MR. BOUCHER: No, your Honor, and I apologize for that response.

JUDGE CRONIN: And I am sure that if somebody does go up on that oven, it can be easily proven, I would expect.

MR. BOUCHER: Yes.

JUDGE CRONIN: And I just feel that we are taking up a great deal of time on that issue.

I would agree with you that you have established that at this particular point no one has been seen going up on that oven, but it is also established that at least one of the respondent's representatives has indicated that supervisory -- maintenance personnel went up there, not supervisory

personnel.

MR. BOUCHER: Yes, sir.

JUDGE CRONIN: But I just feel we are taking up a great deal of time on this particular issue.

Q What is it that makes the top of this oven a work platform, in your view?

A To begin with, it is a platform and work can be performed up there.

Q So in looking at this window at that flat roof across the road here, that apparently has some sort of cylindrical object protruding from it on top, if anybody ever went up there to paint those cylindrical objects, that would be a work platform?

A Yes.

Q Does it matter how frequently somebody goes up there?

A As far as defining it as a work platform?

Q Yes.

A No, it is more the manner.

Q So if somebody goes up there once every five years,

it is still a work platform?

A Most definitely.

Q And you still must rail it?

A Most definitely.

Q If somebody goes up there once every ten years, it is still a work platform, in your view?

A Yes, as far as the question asks.

Q And you still must rail it?

A Yes.

JUDGE CRONIN: Would it be permissible to rail it at the time the work was being performed?

THE WITNESS: Most definitely.

JUDGE CRONIN: You would not have to keep the rail in tact at all times, would you?

THE WITNESS: No, because you don't have the employee exposure at all times.

Q Did you consider whether any other precautions were taken when an employee might walk on top of this oven?

A Here again, I think you would have to rely on

Mr. Bernard's testimony.

It was -- I would have been out of place as far as getting that deep into the inspection.

Q You discussed the citation with Mr. Bernard prior to its issuance, didn't you?

A Yes.

Q And he told you that in his view the top of that platform -- excuse me, the top of that oven was the work platform?

A I think that comes from seeing the standard cited. It was discussed though, yes.

MR. BOUCHER: Mr. Jerum has a few questions on the jaws.

CROSS EXAMINATION

BY MR. JERUM:

Q Mr. Taylor, are you an expert in stress analysis?

A In what context are you defining expert?

Q Do you consider that you have expertise regarding the stresses that apply to Secretary's Exhibit 34?

A In the definitive way?

* * * * *

Q Did you have any discussion with -- about that report at that time?

A No, none.

Q And do you recall the meeting of August 1st that you previously testified to?

A I recall it briefly, yes.

Q Do you recall any discussions of -- well, you talked to Mr. Rooney, I suppose on four occasions you stated, two meetings and two phone calls; is that correct?

A That is right.

Q And do you recall any discussions with Mr. Rooney with respect to the guarding of the top of the dip and bake oven?

A Yes, I received a phone call from Mr. Rooney on the 5th of September, I believe, relative to some of the things that they had done and they had not done, and he did mention what they had done or intended to do with regard to the ovens.

Q And what did he tell you at that time?

A He said that they -- as far as the railings

were concerned with regard to the ovens, that they felt that it was not a violation, but they would install them on a good faith basis, and that the railing above number two oven would extend about six feet, or something to that effect.

Q Did they say they were going to rail the whole platform or the whole surface?

A No, they mentioned something about handrails and something about a rail over the oven, the number two oven, I believe extending six feet.

Q It was six foot of rail?

A Right.

Q Not a railing around the whole surface?

A My understanding was merely six feet of railing.

Q Do you recall any discussions -- were there any other discussions with Mr. Rooney about that other than the September 5th telephone call?

A About the ovens?

Q Yes.

A Not that I recall, no.

* * * * *

DIRECT EXAMINATION

BY MR. GOTSCH:

Q What is your name?

A Anthony Perone.

Q Where do you reside?

A R.D. number 2, Clason Road, Scotia, New York.

Q Mr. Perone, by whom are you employed?

A Excuse me?

Q By whom are you employed?

A General Electric.

Q And are you a member of any union?

A 301.

Q What is your job with General Electric?

A Structural steel worker.

Q Structural steel worker?

A Yes.

Q And what buildings do you work in at General Electric?

A 85.

Q Building 85?

A Yes.

Q What type of work do you do as a structural steel worker?

A Welding, repairing belts, you know, putting belts on, chains, removing motors, anything that deals with structural machines.

Q Machines?

A Yes.

Q Do you work on any portable equipment?

A On any portable --

Q Do you maintain portable equipment?

A What is portable -- I mean --

Q Well, something that is moved around, handles, something like that.

A That is hard to answer.

Q Mr. Perone, do you have any knowledge of the dip and bake ovens in building 81, bay C18?

A Yes.

Q Have you ever done any work there?

A Yes.

Q How many dip and bake ovens are there over there or how many ovens are there?

A Four.

Q And have you worked on all of them?

A Three of the four, because one of them is brand new.

Q Brand new?

A One is newer.

Q And how long has that been there?

A The past couple of years.

Q Now, what type of work do you have to do in connection with these ovens?

A Belts, taking motors out.

Q And where are these motors located?

A On top of the oven.

Q On top of the oven. And how do you reach these--

A They are exhaust or circulating belts. I go up the ladder.

Q Up the ladder?

A Yes.

Q And what do these motors drive? What is their function?

A They are either circulating or exhaust.

Q Now, Mr. Perone, there has been some discussion about an oven which is in the center of this

group of ovens.

Have you worked ~~at~~ any time upon this oven?

A Yes.

Q How often have you worked on this particular oven?

A How long a period of time?

Q How long have you been in your present job?

A About two and a half years.

Q And prior to that, what was your job?

A I was on a casting machine.

Q So you have been in structural -- what was your--

A Structural steel worker.

Q -- for two and a half years?

A Yes.

Q And all of this time in the same building?

A Yes, SAC.

Q In the SAC department?

A Right.

Q In the last two and a half years, how many times have you worked on top of this particular oven?

A About four or five times.

Q And what were your duties when you had to go up there?

A Well, on the blowers, you know, changing the belts, we changed the bearings up there.

Q Changed belts and bearings?

A We put that piece of guard rail that is on the -- alongside there.

Q About how much guard rail did you install there?

A About six feet.

Q About six feet?

A Yes.

Q When you have been up there, have you ever been tied off with a safety belt?

A No.

Q You have never used a safety belt, a lifeline attached to anything?

A No.

Q Had they put nets around the edge of these platforms?

A No.

Q Have they ever rolled over a mobile scaffold, perhaps with guard rails attached?

A No.

Q So when you have worked up there, was there any means at the edge of the platform that would prevent an individual from falling off?

A No.

Q Do you know of any other employees that might have been up on that platform?

A Yes.

Q What other employees?

A My partner, for one.

Q What is his name?

A Harold Benta.

Q And do you know any other employees that might be called upon to go up there?

A All of the steel workers would be required to go up there.

Q All of the steel workers?

A Or electricians, yes.

Q So you are not the only one that has gone up there in the last two and a half years?

A No.

JUDGE CRONIN: Within the period from

Perone-direct

4/22-114

October 1, 1973 to October 1, 1974, do you recall how many times you were up on that platform of that oven?

THE WITNESS: From 1973?

JUDGE CRONIN: Yes, within the year period prior to October, 1974.

THE WITNESS: About four times.

JUDGE CRONIN: About four times?

THE WITNESS: Yes, I believe it was last August when I installed that guard rail.

In fact, the first --

MR. BOUCHER: I move to strike any testimony as to the guard rails. It was put up at the union's request, and obviously --

THE WITNESS: That is on top of the oven.

JUDGE CRONIN: I am aware of that, Mr. Boucher.

That is the last time you were up there, in August.

Have you been up there since?

THE WITNESS: No, I have been up there

since, you know, that was installed.

Q Mr. Perone, you mentioned the blowers on the oven.

Where are those blowers located with relation to the railing such as is present on the platform?

A To go up the ladder you just turn and there they are. One of the circulators is up front, you know, looking from the back of the motor or the oven, it would be on the left side, and if you are facing it, it would be up on the right.

Q When you are working on these blowers, how close do you come to the unguarded edge of the oven?

A That is hard to determine. In feet?

Q Yes, in feet, the distance.

A The one would be about four feet.

Q Which one would that be? .

A That back blower.

Q The back blower?

A Yes.

Q Is there a railing there when you are working about four feet from the edge?

A No.

Q No railing?

A No.

Q And how about the other blower?

A No, none. This is up front, and there is none.

Q There is no --

A In the back there is that six foot piece of rail, just on the one side.

Q Yes, and when you are working on the blowers, do you feel that you receive any protection from that rail?

A No.

Q It is not in that area?

A The back blower is. It is a six feet piece, but it does not extend all the way to the end, so it depends on where you are working, on what side of it.

JUDGE CRONIN: What is the closest to the edge that you work? You have indicated four feet.

Now, do you work any closer?

THE WITNESS: Well, if we are taking a motor out, we have to lower a motor over the side, so you are going to be right on the edge.

JUDGE CRONIN: Well, if there was a railing there, you would have to remove the railing, too, wouldn't you?

THE WITNESS: You could, or if there is enough space, you can get it through and lower it.

JUDGE CRONIN: How big is one of these motors?

THE WITNESS: Gee, I don't know, I don't know the horsepower.

Q You could remove the motor without taking the railing down; is that your testimony?

A If the spacing was enough, yes.

Q Well, compared to the railing that is in place right now, could you get -- do you think that you could get the motor through that rail?

A You don't have to, there is no rail on the edge, you just, you know, do it at the open

space.

Q So at this point you would lower it over an un-guarded side?

A Right.

Q Do you often have to remove the motors?

A If they burn out.

Q What other type of work do you have to do up there, or have you done up there?

A Well, the belts, you have belts that come off the motors, pulleys.

Q What do you have to do when that happens, when the belts come off the motors?

A You just remove the belts.

Q You put them back in place, right? The guards?

JUDGE CRONIN: How close are you to the edge when you are removing the belts?

THE WITNESS: It depends on which belts.

JUDGE CRONIN: Well, tell me whatever is up there.

THE WITNESS: The closest belt would probably be -- that would be on the circu-

lator, I imagine it is about a foot.

JUDGE CRONIN: A foot?

THE WITNESS: A foot, a foot and a half.

JUDGE CRONIN: And how many belts are there altogether that you might have to work on?

THE WITNESS: From the top of the oven?

Q Yes.

A There is quite a few.

Q Would there be ten?

A Gee, right offhand I don't know how many belts. You know, I don't -- did not -- you know, you don't stop to count them.

Q There are quite a few up there?

A There are belts, yes.

Q And the maintenance on one would bring you about a foot and a half from the edge of the platform?

A On the one, yes.

Q And is that particular section near where the railing is that is in place?

A No.

Q It is not?

A No.

Q Now, you say the steel workers, the structural steel workers go on that particular dip and bake oven.

What other trades might be called upon to go up there?

A Electricians.

Q What would they be doing up there?

A They would unwire the motor.

Q Unwire the motors?

A Right.

Q Have you ever seen any electricians up there?

A Yes.

Q Do you recall when or on how many occasions?

A No, I could not tell you, you know, because I know when we worked on one bearing, the motor had to be removed, and he disconnected all of the wiring on it.

Q So an electrician had to come up with you?

A You could not touch a motor unless it is disconnected.

Q So you don't disconnect motors?

A No.

Q Electricians do that?

A Electricians do that.

Q Do you know of any trade that might work up there?

A On that particular oven?

Q Yes.

A No.

Q Now, you stated there were other platforms or other ovens in the area; is that correct?

A Right.

Q Do they -- do you know -- how would they compare in height to the platform you were on?

MR. BOUCHER: Your Honor, I am going to object on the basis of relevance.

JUDGE CRONIN: What is the relevance, Mr. Gotsch?

MR. GOTSCH: The relevancy, your Honor, is that there were several other ovens that are exactly in the same condition, unguarded.

JUDGE CRONIN: Yesterday my ruling was that I am only going to accept the evidence with respect to that particular oven, so I am going to sustain the objection.

Q Mr. Perone, are there any guard rails in position on any of the other ovens in that area?

MR. BOUCHER: Objection.

JUDGE CRONIN: Sustained.

MR. GOTSCH: Your Honor, I think it has some relevance.

JUDGE CRONIN: I will hear you on it.

What is the relevance.

MR. GOTSCH: Well, the relevance is that, of course, there are other ovens where, in fact, the employees work even on a greater number of occasions, perhaps weekly, that are also unguarded, and that the respondent has been objecting that there is fairly infrequent use here as opposed to perhaps other area, but as it turns out, even where the employees are up there fairly frequently,

these ovens are also unguarded.

JUDGE CRONIN: The difficulty, Mr. Gotsch, is the fact that he was charged, the respondent employer was charged here with a violation of no guarding on the top of this middle oven, and this was the testimony by Mr. Bernard.

MR. GOTSCH: Yes.

JUDGE CRONIN: Yesterday you attempted to introduce additional evidence on this and there was an objection, and I sustained it, and then you moved to amend, and I denied that motion because of the lateness of your motion.

I feel that the only evidence with respect to the lack of guard railing should pertain only to this oven.

Now, you have established through this witness that he was up there on a number of occasions.

Now, the fact that he saw other people on other ovens on a more frequent

basis does not pertain to the alleged violation here.

So I am going to sustain the objection.

MR.KEAST: Your Honor, I would just like to ask a question as to your position with respect to this particular citation.

If I am correct, the only way that we would be able to get the proper guarding for these ovens would be to go back and file another OSHA 7, and have the secretary come in and issue another citation with respect to exactly the same condition that we are discussing here.

I --

JUDGE CRONIN: Well, certainly -- let me explain something to you, Mr. Keast.

Assuming now that I found that there was a violation with respect to this particular oven, I think it would be obvious, Mr. Keast, to the respondent employer in this case that it would be applicable to all

similar ovens, and, therefore, failure to take steps to guard the other ovens, I think, would be rather irresponsible on the respondent's part, because obviously you could have another inspection and another citation would issue, and certainly the respondent employer would be on notice by my finding in this -- with respect to this particular oven that it would be applicable to all similar ovens.

So I don't think that concern is well taken.

If the secretary had included in his citation, the other particular ovens, we would be considering them here today, but I made my ruling that I felt it was too late to amend at that particular time.

So that is my ruling.

MR. KEAST: Thank you.

MR. GOTSCH: Your Honor, the last thing I would have to say on the point is that respondent apparently is trying to show

that if there is relatively infrequent use of this particular platform, that perhaps he is entitled to some kind of exemption.

I think what we are trying to show through this witness, who works in this area every day, is that other ovens are even serviced more frequently than the one in question and that -- and, of course, that the same conditions obtain.

I think it more -- it tends to refute the inference that the respondent has been trying to make, that if this was used on a regular basis, they would have guarded it, and I just want to put that particular issue to rest.

I feel that this witness can do it.

JUDGE CRONIN: My suggestion would be then that you should have made those other ovens the subject of your citation.

Q Mr. Perone, can you give us your estimation as to the dimensions of this roof of the dip and bake oven? Approximately how long and how wide

is this particular surface?

A How long and how wide is it?

C Yes.

A I don't know, but maybe around twelve foot by -- it could be about twenty feet long.

Q About twelve by twenty?

A Something like that.

Q And the only guarding covers some six foot of that?

A Yes.

MR. GOTSCH: I have no further questions.

JUDGE CRONIN: You have indicated, Mr. Perone, that you and your partner have gone up there.

You have also indicated that you recall going up there at least four times in the year preceding October, 1974. How many times has your partner gone up there? Does he always go up there with you?

THE WITNESS: When we are together, yes.

JUDGE CRONIN: Well, would he go up there on occasion alone? Do you know?

THE WITNESS: He could.

JUDGE CRONIN: He could. Have you ever seen any structural steel workers, any other structural steel workers upon this particular oven?

THE WITNESS: Yes.

JUDGE CRONIN: And do you recall on how many occasions you have seen these other structural steel workers?

THE WITNESS: I have seen three other structural steel workers up there.

JUDGE CRONIN: On just one occasion or on more than one occasion?

THE WITNESS: On different occasions.

JUDGE CRONIN: On different occasions.

Now, you have indicated that you have also seen electricians up there?

THE WITNESS: Yes.

JUDGE CRONIN: Are these on the same occasions that you have been up there or

have you seen electricians on other occasions up on this oven?

THE WITNESS: The electricians that I have seen have been with me.

JUDGE CRONIN: They have been with you?

THE WITNESS: If it was not on a motor, there was a heater on there that they worked on, or something of that sort.

JUDGE CRONIN: Now, when you go on this particular oven, is there a record made of that?

THE WITNESS: Yes, I believe there is.

JUDGE CRONIN: Do you make out a work order or a work form?

THE WITNESS: I believe the formman has a record of that.

JUDGE CRONIN: He has a record of that.

Do you know how long they keep these records?

THE WITNESS: No.

JUDGE CRONIN: You don't know?

THE WITNESS: No, when they get a call that that oven breaks down, he normally logs it into a book or a leader, whoever is there, and then they pass this job out to us to go up there.

JUDGE CRONIN: Mr. Keast, would you like to ask any questions?

MR. KEAST: No, I have no questions.

JUDGE CRONIN: Mr. Boucher?

MR. BOUCHER: Yes, sir.

CROSS EXAMINATION

BY MR. BOUCHER:

Q Which shift do you work on, Mr. Perone?

A Right now?

Q Well, right now, yes.

A The first shift.

Q And how long have you been on that shift?

A On the first shift?

Q Yes.

A Three weeks.

Q And what was your shift prior to that?

A The second.

Q And how long were you on the second shift?

A Over two years.

Q Who was your foreman?

A Rightnow?

Q When you were on the second shift?

A Barlow.

Q And who was the general foreman?

A You mean his boss?

Q Yes.

A Right now it is Walzak, and before that it was Mozure.

Q You testified there were four ovens in this area; is that correct?

A Yes.

Q Is there only one in the center?

A Center of what?

Q When reference is made to the oven in the center, is there any question in your mind concerning which oven would be referred to?

A I know which one it is.

Q You know which one it is merely by the appellation, by it being referred to as the oven in the center?

A What are you talking about? If they refer to down there, they would just say special bake oven.

Q Did somebody tell you which oven SAC has been cited for?

A Did somebody tell me?

Q Yes.

A Yes.

Q Without being told that, would you know which oven was the oven in the center?

A Yes.

Q Merely referring to it as the oven in the center, that would bring a specific oven to your mind?

A Right.

Q Is this the oven SAC has been cited for?

A Right now, in the center?

Q Yes, do you know that as a fact of your own knowledge?

A What I have been told.

Q But do you know -- were you present during the OSHA inspection?

A No.

Q So you did not see which oven the OSHA inspectors looked at, did you?

A No.

Q So you, in fact, don't have any direct knowledge regarding which oven SAC has been cited for, do you, of your own knowledge, and not what you have been told?

MR. GOTSCH: Your Honor, I am going to object because I was willing to have this gentleman testify as to all of the ovens which he has worked upon, and others, even for a greater extent than the one in question here.

We could prove all of the ovens through this employee, so I don't think there is any purpose to this particular question.

JUDGE CRONIN: Well, I don't really see the purpose, Mr. Boucher.

Let me ask Mr. Perone, are the ovens, the four ovens right along in a row?

THE WITNESS: Three of them are. There is three of them in a row.

JUDGE CRONIN: So when you talked about the middle one, you are talking about the middle one of the group of three?

THE WITNESS: Yes.

Q Now, you have been a steelworker for approximately two and a half years?

A Yes.

Q And perhaps I jotted it down incorrectly, but my notes indicate that you said you had been on this middle oven approximately four to five times during your career as a steel worker?

A Right.

Q And that would span the two and a half years?

A Yes.

Q One of the times you went up there was to install a certain amount of railing in August, 1974?

A Yes, a six foot piece.

Q Have you been up there since August?

A Has it been up there --

Q Have you been up there since August?

A Yes, I believe I have.

Q Have you been up there since October of 1974?

A Of 1974?

Q Yes.

A Yes, I probably was.

Q Well, you testified that in -- that at this --

A You are saying if I have been up there, yes,
I think so.

I think it was on a heating element.

Q You testified that at this point in time, if you
were to remove a motor, you would lower it over
the unguarded side; is that correct?

A It is open, yes.

Q Don't you realize that the entire top of that
oven is now railed and has been railed since
October of 1974?

A It is all railed?

Q Yes, that is what I am asking. Do you realize
that?

A No, I don't.

MR. BOUCHER: I have no further questions of this witness, your Honor.

JUDGE CRONIN: Any redirect?

MR. GOTSCH: Just one point, yes.

REDIRECT EXAMINATION

BY MR. GOTSCH:

Q Mr. Perone, when you installed those railings, I think I asked you before whether you have ever used safety belts or any other means of protection.

Were any of these -- were safety belts and lifelines provided to you when you installed the railing?

A No.

Q And there were no nets placed around the edge of the platform?

A No.

MR. BOUCHER: I don't remember this on cross. It was certainly brought out on direct.

MR. GOTSCH: Well, you asked him whether he had installed the railings.

JUDGE CRONIN: Well, I am going to permit it. I think he has answered it.

MR. GOTSCH: I have nothing further.

MR. KEAST: I have one question.

RECROSS EXAMINATION

BY MR. KEAST:

Q Mr. Perone, when was the last time you saw that oven?

A That rail?

JUDGE CRONIN: No, the oven.

Q The oven itself, when was the last time you looked at that oven?

A That is hard to say.

Q Didn't you work yesterday?

A No.

Q Did you go into work at all yesterday?

A No.

Q Do you recall -- when was the last time you were in building 81 around those ovens?

A When I was over in 81?

Q Yes.

A Friday -- Saturday.

Q Do you know whether that oven is guarded now, whether it has a rail around it? Is there a guard there?

A I don't know.

Q You did not notice?

A No.

MR. KEAST: I have no further questions.

JUDGE CRONIN: Thank you very much.

MR. GOTSCH: Your Honor, I now call Mr. Frank DeLuccia to the stand.

* * *

Thereupon,

FRANK DE LUCCIA,

was called as a witness on behalf of the Secretary of Labor, and having been first duly sworn, assumed the witness stand, and upon examination, testified as follows:

DIRECT EXAMINATION

BY MR. GOTSCH:

Q What is your name?

A Frank J. De Luccia.

* * * * *

Q So you don't recall any response from management on August 29th?

A No.

Q Do you recall any discussions that you or other representatives of the safety committee may have had with respect to the Warner and Swasey lathe?

A Yes, at the August 29th meeting, Matt Rooney was representing the company, and he said that he could not find the lathe.

Q And what did you respond to that, or did anybody else respond to that?

A Well, John Keast told Mr. Rooney that he would be willing to go out and show him the machine, and Mr. Rooney said no.

Q Now, with respect to the dip and bake oven, did you have any discussions with management at either of these meetings concerning the platform?

A Yes, we did.

I think -- I am not sure whether it was the August 1st or the August 29th meeting, but I think it was the August 1st meeting where Matt Rooney said that he did not consider the top of

the oven a catwalk, but they were going to put up a partial railing on a good faith basis.

Q And did you or other members of the safety committee make any response to that?

A We considered that the top of the oven was a work platform, and we told him that we wanted a standard railing around the outside of the oven, the entire outside of the oven.

Q Did Mr. Rooney or anyone else respond to that?

A Well, they -- their position was that it was not a work platform -- it was not a catwalk, I think he said.

Q Well, you were not alleging that it was a catwalk, were you?

A No, we were alleging that it was a -- it is a work platform.

Q Was there any other discussion after this particular one, I think you stated it was probably August 1st?

A Well, August 29th, they took the position that it was not a catwalk or a work platform, and I think, I am not sure, but I think we

disagreed.

Q Is that the way it was put?

A That is the way it was put, yes, they said it was not a work platform and we did not want to beat it to death, so we agreed to disagree.

Q Now, Mr. Trinci, you were not present during the inspection in October, were you?

A No, sir.

MR. GOTSCH: I have no further questions of Mr. Trinci.

JUDGE CRONIN: Mr. Keast?

MR. KEAST: Yes, I have a couple of questions.

CROSS EXAMINATION

BY MR. KEAST:

Q Mr. Trinci, do you -- did you relate to me -- could you relate to me what circumstances led you to contact myself and Mr. Rafferty for an inspection?

MR. BOUCHER: Objection, your Honor, it is irrelevant.

JUDGE CRONIN: Overruled.

* * * * *

sixteen or seventeen, and I think -- there was a power shear, I think that was in question.

I don't recall all of the specifics.

Q But you did not discuss the index presses?

A No.

Q And you did not discuss the Walker-Turner cutoff, did you?

A Yes, we did.

Q Now, attached to exhibit S-33 is the letter addressed to you from Mr. Rafferty dated July 22, 1974, which is also attachment 8A to Exhibit S-33.

Did you receive that letter?

A Yes.

Q With regard to the dip and bake area -- by the way, did you -- were you aware of this prior to the meeting of August 1st?

A Aware of what?

Q This letter dated July 22nd, from Larry Rafferty addressed to you?

A Well, I received it.

Q Did you receive it?

A I received it on or about that date, I guess.

Q Did you read it?

A Yes.

Q Did you have any disagreement with anything that was stated in there?

A Not that I recall.

Q And on the second page of that, again with reference to the dip and bake area, it is stated, "In the special dip and bake area there is a catwalk that is ten feet eight inches above the floor. There are no top rails, midrails or toe boards."

Is that the oven we are referring to?

A Yes.

Q The catwalk is the appropriate discription?

A Of what, the oven?

Q The top of the oven?

A Yes.

Q Now, you looked or top oi this oven; is that correct?

A Yes, I did.

Q There is an area with the catwalk on top of that oven; isn't that correct?

A I believe there is.

Q That is not the entire top of the oven, is it?

A No.

Q And the motors are not on that catwalk, are they?

A No, they are not.

Q And didn't the SAC management officials respond at these meetings that they did not think this was a violation of 23(c)(1), but on good faith basis they would rail the catwalk?

A Yes.

Q And on that particular citation I think you stated you agreed to disagree?

A I think that was -- word to that effect, yes.

JUDGE CRONIN: Mr. Trinci, when did you first discuss with any of GE's management personnel that the union desired that the entire top of that bake oven be enclosed with a standard railing?

THE WITNESS: August 1st.

JUDGE CRONIN: August 1st?

THE WITNESS: Yes.

JUDGE CRONIN: Well, when they kept responding to you that they would put a guard rail along the catwalk, did they ever direct their statement to the entire top of that oven?

THE WITNESS: I don't know if they did. We did.

JUDGE CRONIN: You did?

THE WITNESS: Yes.

JUDGE CRONIN: But you don't remember their responses, except that they talked about the catwalk?

THE WITNESS: Yes, they said they were going to put up a partial railing.

JUDGE CRONIN: On the catwalk.

THE WITNESS: Well, I assumed they were talking about the oven.

JUDGE CRONIN: They never used the term catwalk?

THE WITNESS: Yes, they did.

JUDGE CRONIN: They did?

THE WITNESS: They were saying catwalk
and we were saying the top of the oven.

We considered the top of the oven a
work platform, they did not.

JUDGE CRONIN: In your opinion, do
you feel that there was any lack of commun-
ication as to what you meant as opposed to
what they meant?

THE WITNESS: No, they knew what we
wanted.

JUDGE CRONIN: They knew that you
wanted an enclosed standard railing around
the entire top?

THE WITNESS: Yes, sir.

JUDGE CRONIN: And not just the cat-
walk?

THE WITNESS: Right.

JUDGE CRONIN: Then why is it that
the union representatives in this document
refer only to a catwalk?

THE WITNESS: I don't know, sir.

Q Yes, Mr. Trinci, as Judte Cronin just pointed out, the original complaint or the letter addressed to you by Mr. Rafferty refers specifically to a catwalk, and as we browse through the minutes of the subsequent meetings on August 1st and August 29th, we find the company officials referring to a good faith effort, and on that basis we will rail the catwalk.

A Yes.

Q Isn't it surprising that something as important as this, or something which I assume you would think was important, there is no reference anywhere in the union's minutes, that no, we are not interested in the catwalk, we want the entire top of the oven?

A Well, I cannot vouch for those minutes, I did not write them, but it was mentioned.

Q You stated that one specific machine with flex wiring was discussed.

Do you remember what machine that was?

A I think it was a Walker-Turner cutoff saw,

* * * * *

this type of a machine?

A No.

Q Turning to Citation 8, paragraph 1, the alleged work platform in Building 81, C-18, are you familiar with the bake and dip oven-- it is described as a bake oven.

Is it a dip and bake oven?

A It is strictly a bake oven.

Q Now, you were with Mr. Bernard at the time of the inspection?

A Yes, I was.

Q Do you know which oven he had reference to during his testimony?

A Yes, I believe I do.

Q Prior to the OSHA inspection, were you aware that the union was alleging there was a catwalk in the bake and dip area approximately 10 feet, 8 inches -- excuse me, 11 inches above the ground?

MR. GOTSCH: Your Honor, I will object to that question as completely leading.

MR. BOUCHER: I don't know how else to phrase it.

He was aware of what the union alleged --

MR. GOTSCH: I think there would be a better

way to phrase it so that Mr. Sweeney could respond to the question rather than Mr. Boucher putting all of the words in the witness's mouth.

JUDGE CRONIN: It is leading, but I think it is a preliminary question.

MR. GOTSCH: Well, I don't know --

JUDGE CRONIN: Well, I think it is perfectly appropriate, and I am overruling your objection.

MR. GOTSCH: All right.

Q Were you aware, sir, that the union representatives of Local 301 alleged prior to the OSHA inspection that there was a work platform approximately 10 feet, 11 inches, above the floor in the bake and dip area?

A Yes.

Q Prior to the OSHA inspection in October of 1974, did you inspect the particular oven for which we have been cited, for which SAC has been cited?

A Yes, but I would like to reflect on that past question.

Did you say work platform?

Q Well, did you understand they were complaining about the work platform?

A No.

Q What was your understanding of the complaint?

A A cat walk.

Q A cat walk.

Then you had again a copy of the union's letter to Mr. Trinci, or you had a copy of that letter?

A Yes.

Q And it was your understanding they were complaining about a cat walk?

A Yes.

Q All right. And you did inspect the top of this particular oven?

A Yes.

Q Are you generally familiar, sir, with the OSHA standards?

A Yes, I am.

Q Are you familiar with the requirement of 1910.23 (c) (1)?

A Yes, I am.

Q Did you make a determination concerning whether or not -- Yes, did you make a determination concerning whether or not the top of this oven was required to be railed pursuant to 23 (c) (1), and this, of course, is prior to the OSHA inspection?

A Yes.

Q And what was your determination, sir?

A That it need not be railed.

Q Did you consider this a platform?

A No, I did not.

Q What did you consider it?

A The top of a piece of equipment, machinery.

Q Is it necessary for this oven to have a top?

A Yes.

Q And the motors, did they rest on anything other than the top of the oven?

A No.

Q Now, you stated the union was interested in a cat walk or at least you understood the complaint to be about a cat walk.

Did you observe anything on top of this oven that might be construed as a cat walk?

A Yes.

Q What did you observe, sir?

A A piece of nonskid grating where the ladder met the top of the oven, extending from six feet north.

Q Away from the ladder?

A Away from the ladder.

Q Did you report your conclusions to anybody concerning the top of that oven, that is, whether or not it was a work platform?

A Yes.

Q And who did you report that to, sir?

A I believe Mr. Rooney.

Q Are you generally familiar with the operations of this oven, sir?

A Yes.

Q Do the operators go on top of this oven in order to run the oven?

A No.

Q Do the operators go up there for any reason, sir.

JUDGE CRONIN: Mr. Sweeney, in your opinion, can the top of a piece of equipment ever constitute a work platform?

THE WITNESS: If there is reason to go up there to operate it, Your Honor.

JUDGE CRONIN: What about to go up there to perform work?

THE WITNESS: In the normal course of operating the piece of equipment?

JUDGE CRONIN: No, to go up there to perform a function necessary for this oven to operate.

THE WITNESS: I don't think I understand what you are saying.

You are saying that somebody has to go up there in order to make the oven do what it is supposed to do?

JUDGE CRONIN: That is correct.

THE WITNESS: In the normal course of the work that is put through the oven?

JUDGE CRONIN: Well, let's say the motor burns out.

THE WITNESS: Then I would not consider that to be a work platform.

JUDGE CRONIN: You would not, even though work had to be performed in order to put that piece of machinery back into operation?

THE WITNESS: Yes.

Q Have you ever considered, sir, the use of life lines or lanyards for employees to go up on top of that particular oven?

A Yes.

Q In your opinion, would the use of such lanyards increase the safety of the employees on top of that oven?

A Not necessarily.

Q Will you explain that for me, please?

A There is a portion of the top that we are talking

about, that has a piece of channel, and it has light on one side, a string of lights, a ladder on the other side, and on the back side there is a conveyor that goes approximately a couple of feet away.

To work on the oven you would need a certain amount of slack in your lanyard, and I am afraid if you fell off and did not reach the floor, you would just swing into the side or into something else that is adjacent to that area.

Q Have you ever heard of anybody falling off of that work platform, sir, the top of the oven?

A No.

Q Prior to the OSHA inspection, was a railing, a partial railing, placed on top of that oven?

A Yes.

Q Was that because you felt a railing was required by the standard?

A No, it was a measure of good faith to the union.

Q To the union.

Then how far did that railing extend?

A The railing, as you come up the ladder on the right-hand side of this oven, goes up from that portion of the ladder to the side --

Q The top of this oven is in two steps?

A Yes, we are talking about a lower step on one end of it.

From the top -- from the ladder to the right-hand wall, heading east, there was a rail put up.

From the ladder, the length of the cat walk, that would be down the west side of the railing from the ladder north, there was a railing put up with a mid-rail and toe board.

Q The length of where this non-skid surface is?

A Yes.

Q And it has a toe board, you stated?

A Yes.

Q And you stated that the top of this oven is in two steps; is that correct?

A At least two.

Q All right. How high is, let's say, the second step above the first step? Are the motors where the first step is?

A Yes.

Q And how high is the second step?

A It is higher than the railing height of 40 some inches. I would say it is close to five to six feet.

Q During the inspection, did Mr. Bernard indicate that the second step needed a rail?

A No.

JUDGE CRONIN: What did he indicate?

THE WITNESS: Just this lower portion continuing on from the cat walk to the end up to the other wall and down on where the step would come up.

Q Are you aware of a citation, Citation 11, for the flexible cord on the Index Presses, sir?

A Yes, I am.

Q Prior to the OSHA inspection, were you aware of any complaints from representatives of Local 301 concerning that wiring?

A No.

Q Were you aware of any complaints from Local 301 with reference to machinery attached to its power ~~saw~~^{source} with flexible wiring?

A There was a reference made of flexible by the power shears, I believe.

Q Did you investigate that?

A Yes, I did.

Q And what did you find when you investigated it?

A There is several electrical hook-ups at the machinery at the power shears west.

The only thing that I could see that could be

.

feel, Mr. Gotsch, that it is rather repetitive. We have gone over and over this particular area, and I have not brought this to a halt, but I think pretty quickly I am going to.

MR. GOTSCH: All right.

Q Now, Mr. Sweeney, was it your decision not to guard the platform on the dip and bake oven or the dip oven or the bake oven, the one in question?

A Would you define platform for me?

Q Well, was it your decision not to guard the upper surface of the oven?

A The entire upper surface?

Q That is correct.

A Yes, it was my decision.

Q Was that your decision alone?

A I have the prime responsibility for that decision, yes.

Q It was your decision to guard the 6-foot area that had the non-skid surface?

A The cat walk?

Q If that is what you call it.

A Yes, in efforts of good faith.

Q Are you familiar with 1910.23 (c)(1)?

A The section on platforms?

Q That is right.

A Yes, I am.

Q And it was your decision not to construe this surface above -- which is over four feet off the ground, you would agree, would you not?

A Yes, I would agree to that.

Q It was your decision not to guard this with the standard railing as specified in the standard, is that correct?

A My decision was that it was not a work platform.

Q How did you arrive at that decision that it was not a work platform?

A No employee has to regularly go up there to do anything affecting the performance of that piece of equipment.

Q Do you know that employees do go up there, to the upper surface of the oven?

A You are talking about maintenance employees?

Q Right. Those are employees, are they not?

A Yes, they are.

Yes, I do know.

JUDGE CRONIN: Please, Mr. Sweeney, unless you have trouble with understanding the question -- He asked you if you knew if any employees

went up there.

THE WITNESS: Yes, I confused that with operators. I am sorry, Your Honor.

Maybe I should have said operators in the first place.

Q You are aware that maintenance employees go on top of the oven; is that correct?

A Yes.

Q Have you ever seen maintenance employees on top of the oven?

A That particular oven, yes.

Q What types of maintenance employees on top of the oven?

A That particular oven, yes.

Q What types of maintenance employees would go on top of the oven?

A Steelworkers, electricians.

Q And what would they be doing up there?

A Any repairs that may be necessary to the top of the oven and/or the controls, the circulating or heating equipment that is there.

Q And you had seen employees on top of that oven prior to October 1st, 1974?

A I believe so.

Q Have you seen employees on top of the other ovens in that general area?

MR. BOUCHER: Objection, Your Honor. It is irrelevant.

I think we have ruled on this twice.

JUDGE CRONIN: Sustained.

MR. GOTSCH: Well, Your Honor, I think it has relevance.

Apparently -- I want to get at exactly what his meaning of platform is, and you know, for what it is worth --

JUDGE CRONIN: Well, you could ask him that question.

Q Well, Mr. Sweeney, if employees ^{mounted} ~~rounded~~ dip and bake ovens once a week, maintenance employees, would you consider that a platform?

A I might have given that some consideration. I might have given that some consideration, yes.

What are they mounting it for? It is something that regularly has to be done? Yes, something that regularly has to be done. On a non-breakdown or a non- --

Q Preventive maintenance.

A You mean that he has to go up there and do once

a week?

Q Well, assume they have to go up there for preventive maintenance reasons.

A I still would not consider that were a platform per se. I don't believe -- I don't quite understand.

Q Mr. --

JUDGE CRONIN: In other words, is it in your opinion a work platform if only maintenance employees perform work on it?

THE WITNESS: If a maintenance employee has to go up there, Your Honor, regularly to do something, then I think -- just like where there is a runway on a crane, yes, sir, that would be a work platform or an access ladder platform.

JUDGE CRONIN: Mr. Gotsch just asked you the question whether if a maintenance employee had to go up on a particular platform or an area on a weekly basis for preventive maintenance, would you consider that a work platform, and your answer was no.

THE WITNESS: I would have to look at each one individually. I don't consider just the fact that a maintenance personnel mounts the top of a piece of equipment, that that then becomes a

platform, a work platform.

Q Mr. Sweeney, exactly what do you define a platform to be when you walk around the plant --

A A work platform --

Q Well, no, -- I want the term platform. That is the term that is used in the standard, and not work platform.

A We have platforms, Mr. Gotsch, and they will range anywhere from small spaces so that short women can work at a universal size work station, to platforms that are like in front of our double blank print press, which are some 4 to 5 feet off the floor, where they are operator-controlled, where there is a regular need to go there to either service and/or perform the normal operation of a piece of equipment.

In the normal operation of a piece of equipment, someone has to ascend the level.

Q Doesn't the normal operation of equipment involve the maintenance of it?

A Does the normal operation of that piece of equipment involve the maintenance of it?

Q Yes.

A Not so that you will have to go up there on a regular basis.

Q If the equipment isn't maintained, it won't operate after some period of time; is that correct?

A That is correct, but some equipment needs a lot less maintenance than others.

Q However --

JUDGE CRONIN: Well, will the belts on these particular machines work forever?

THE WITNESS: They will run for years.

JUDGE CRONIN: Can it be anticipated that there might be a breakdown of those belts?

THE WITNESS: At some point in time, certainly, yes.

Q These belts from time to time will come off their spindles?

A They don't come off, generally, Mr. Gotsch. They are a V-belt.

Q Well, the motors themselves will wear out, burn out after a period of time, won't they?

A The particular oven in question, I do not remember a motor ever taken off that oven.

Q But in any event, the ovens themselves would not operate if some maintenance was not performed on it, is that a true statement?

A In what -- Once a year, once every two years?

Q No, I am just stating -- It does not matter for the purposes of this question how often the maintenance has to be performed.

Will these ovens operate indefinitely without any maintenance being done?

A Not indefinitely, but for an extended period of time.

Q But you have seen maintenance employees perform work on these ovens?

A Yes, I have.

Q And again, they were changing belts?

A The one time I can remember seeing was the installation of this 6-foot length of rail.

Q And what other occasions did you see him up there?

A I cannot recall another occasion when I have seen people on top of that particular oven.

Q And when people do climb to the top of that oven, are mobile scaffolds put into place around the perimeter of it?

A No, they are not.

Q Are the employees tied off with life lines?

A No, they are not.

Q Do they string nets around the periphery of the oven?

A No, they do not.

JUDGE CRONIN: In your opinion, Mr. Sweeney, is a maintenance employee who has to work on top of this particular oven exposed to any hazard of falling?

THE WITNESS: If he is working on the equipment that is up there, Your Honor, there is no reason to fall, no need for him to go out to the edge.

JUDGE CRONIN: Did you hear the testimony of, I believe, it was Mr. Perone, yesterday, who indicated that he got as close as one foot from the edge?

THE WITNESS: If you roll a motor over the side or something of that nature, I could see that. He possibly could, all right. I have never seen him that close to the edge, and in the normal maintenance of changing a bearing or greasing a bearing, or changing a V-belt, you would not come within one foot of the edge.

Q Mr. Sweeney, have you ever been on top of that oven yourself?

A Yes, I have.

Q Have you ever observed the employees while they were maintaining it, while you were on top of the oven?

A No, I have not.

Q So you don't know how close they have come to the edge, of your personal knowledge?

A I know where the equipment is that they have to service, and what location that is to the edge.

Q And how close is this equipment to the edge?

A The one unit is right in the middle. Past the center there is a circulating fan with a V-belt that runs down to the motor, which is approximately $7\frac{1}{2}$ horsepower, which will make it better than a foot in diameter, which is mounted in from the edge.

Q And how close to the edge is that?

A The center line of that motor is a couple of feet or so from the edge, I would say.

Q And an employee performing maintenance on that particular motor would be within several feet of the edge?

A Within several feet?

Q Yes.

A Yes.

Q Perhaps within one foot of the edge?

A I don't think that is likely.

Q Well, how many feet from the edge would you estimate, based upon your knowledge, he'd come to the edge?

A About perhaps three. He would stand on the side

of the motor.

Q Well --

A The motor.

Q Would it be possible that he would have to do some work on the outboard side?

A To my knowledge, there is nothing on the outboard side that requires maintaining.

Q So your estimation is that the closest he would come would be three feet to the edge?

A Somewhere in that length, yes.

Q When the employees installed the 6-foot railing that you ordered, your testimony was that no special precautions were taken to protect them; is that correct?

A I am not certain that they did not install the bottom portion of it, the vertical portion on portable stepladders along the back of the oven.

Q Well, they would have had to mount the oven during the process of installing that rail, would they not?

A I cannot say for certain.

Q You did not see it?

A No, not too well.

Q Were you the only individual that gave Mr. Rooney the instructions that the railing that was installed was

all that was required or were any other parties involved in that decision, or in the transmission of that to Mr. Rooney?

MR. BOUCHER: I don't think there has been any testimony, Your Honor, that the railing that was installed was required. I believe it was stated that the rail was put on prior to the inspection on a good faith basis.

JUDGE CRONIN: Do you want to rephrase the question.

MR. GOTSCH: All right, Your Honor.

Q Mr. Sweeney, who told Mr. Rooney that the -- only the rail that was being installed on a good faith basis was all that the Respondent felt was necessary?

A I believe I did.

Q Did anyone else enter into that decision which you translated to Mr. Rooney?

A What do you mean --

Q Well, did you discuss this with anybody in the SAC department or anybody in GE safety?

A I may have discussed with either my boss or --

Q Your boss is who?

A Mr. Walzak.

Q And what is his position?

A He is manager of facilities and maintenance, tool and die supply.

Q And what department do they cover?

A The small AP motor and generator department.

Q And did he agree with you?

A I believe he would have, Mr. Gotsch.

I don't know for a fact that he did or did not. Yes, I would have to say that he did.

Q Did you discuss this with Mr. Beddows?

A Not that I recall.

Q Or anyone else involved in safety as a primary job?

A No, not that I recall.

Q You did not feel it was necessary to guard more than that area, even though the union on several occasions indicated that they did not agree with that decision; is that correct?

A The cat walk portion that the railing was put up on?

Q That is right, did you --

A My answer is, I believe, yes.

Will you repeat the question? I keep trying to sort it out.

Q You did not change your decision even based upon further employee complaints about this particular situation?

A No, I did not.

Q Even after the meeting of August 29th where the employee and employer representatives agreed to disagree?

A That is correct.

Q Was that conversation reported to you after the meeting of August 29th?

A The agreeing to disagree?

Q Yes.

A Yes.

Q And you were satisfied that you had acted properly?

A Yes.

Q You did not at this point discuss it with any other individuals?

A No.

Q The non-skid guarding on that surface, what is the purpose of that?

A The non-skid guarding?

Q Right, on the top of the oven, what is the purpose of that?

A It apparently came with the manufacture of the oven. It was up there for some time.

Q What is the normal purpose of a non-skid surface?

A In an area like that, on top of an oven,

generally to keep you from walking on top of the oven.

Q Is it necessary to walk on top of the oven to get to those motors?

A Past the end of the cat walk?

Q Yes.

A Yes.

Q So should --

A Let me clarify that, Mr. Gotsch.

It is only necessary to go up on the cat walk to reach one of the motors.

Q How do you reach the other ones?

A The others are alongside of the cat walk, right there.

Q One of the motors is some distance from that non-skid area; is that correct?

A That is correct.

Q So that area is by no means is the only area where people might walk on top of that oven?

A No.

Q All right. By that you mean there are other areas on the oven where they may walk?

A If you had occasion to go over to the other motor. The other motor can also be reached from the outside of

the oven.

Q What do you mean by that?

A You could access the other motor by laddering the other side of the oven, opposite the fixed ladder side.

Q Have you ever seen anybody do that?

A No, I haven't seen anybody work on that motor either.

JUDGE CRONIN: Did the fixed ladder come with the equipment?

THE WITNESS: Yes, it did, Your Honor, to the best of my knowledge.

JUDGE CRONIN: What would a fixed ladder indicate to you if it came with the equipment? Did someone think that it would be utilized?

THE WITNESS: Well, the way the equipment is installed, and the specifications that we work with, we only have approximately four feet between the ovens, and a portable ladder on that side, and an extension ladder would not give you enough of an angle, so a fixed ladder is one way to access that side of the oven conveniently.

JUDGE CRONIN: But wouldn't someone looking at it reasonably infer that it was going to be utilized by persons to get up on top of that

oven?

THE WITNESS: Yes.

Q And again, you have never climb the portable ladder to the top of that oven?

A To that oven?

Q Yes. I would like to ask you about these ovens, but I can't.

A I'm trying to clear in my mind whether or not we -- when they put the guards up, whether or not they used portable ladders, but I am not sure.

It just seems to me that they had stepladders, but I cannot clarify that for sure.

Q The other motor, I take it, is close enough to the edge that you could see the situation when someone could work off of a ladder to maintain that machine; is that correct?

A No, I just said they could get access to that side, they would not have to come up the other side, climb up that ladder and across the cat walk.

Q They would still have to go on top of the oven?

A It would be safe to say that.

Q They could not work off the ladder?

A Not doing everything that might possibly have to be done to that system, no.

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
GENERAL ELECTRIC COMPANY, INC.,	)	OSAHRC DOCS
	)	
Respondent,	)	
	)	
INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO-CLC, AND ITS LOCAL NO. 301,	)	
	)	
Authorized Employee Representative.	)	

DECISION

Before: BARNAKO, Chairman; MORAN and CLEARY, Commissioners.

MORAN, Commissioner: A decision of Review Commission J. James A. Cronin, Jr., dated August 6, 1975, is before this Commission for review pursuant to 29 U.S.C. § 661(i). That decision, which hereto as Appendix A, ^{1/} vacated two citations which alleged had violated 29 U.S.C. § 654(a)(2) by failing to comply with occupational safety standards codified at 29 C.F.R. §§ 1910.212(a) 1910.309(a). In addition, respondent was held to be in violation of 29 U.S.C. § 654(a)(1), the so-called general duty clause, and 29 U.S.C. § 654(a)(2) for failure to comply with 29 C.F.R. § 1910.23(c). For the reasons set forth below, we affirm.

^{1/} Chairman Barnako does not agree to this attachment.

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Commission's Decision

The charges in this case resulted from an inspection of respondent's worksite by an authorized representative of the Department of Labor. Respondent was issued a total of 18 citations as a result of that inspection. All allegations were timely contested. At the hearing thereon, the parties reached agreement on all but four of the citations. The four citations remaining in issue were considered by Judge Cronin in his subsequent decision.

Review of the Judge's decision was thereafter directed on the following issues:

- "(1) Whether the Judge erred in vacating citation No. 3
(a) by concluding that 29 C.F.R. §1910.212(a)(3)(ii) is inapplicable to the Radiac Cut-Off as a matter of law;
(b) by failing to amend the pleadings under rule 15(b) of the Federal Rules of Civil Procedure to allege non-compliance with the standard at 29 C.F.R. §1910.215(b)(5); and
(c) by failing to amend the pleadings under rule 15(b) of the Federal Rules of Civil Procedure to allege non-compliance with section 5(a)(1) of the Act?
- (2) Whether the Judge erred in concluding that respondent's non-compliance with section 5(a)(1) of the Act was not willful?
- (3) Whether the Judge erred in concluding that respondent's non-compliance with 29 C.F.R. §1910.23(c)(1) was willful and/or repeated as alleged?
- (4) Whether the Judge erred in finding compliance with 29 C.F.R. §1910.309(a) and Article 400-4(1) of the National Electrical Code, NFPA 70-1971, and if so, whether the violation was willful and/or repeated as alleged?2/

We agree with the vacation of citation number 3, but for reasons other

2/ In his review brief, complainant concedes that Judge Cronin properly vacated citation number 11 alleging noncompliance with 29 C.F.R. § 1910.309(a) for the reasons stated in his decision. Although the authorized employee representative continues to seek affirmance of this charge, it only reargues the evidence and does not direct us to any evidence which the Judge failed to consider. Under these circumstances, we will not disturb the Judge's finding.

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Commission's Decision

than those advanced by the Judge. Judge Cronin held that the cited standard, 29 C.F.R. § 1910.212(a)(3)(ii), was inapplicable to the radiac cutoff machine involved because a more specific standard, 29 C.F.R. § 1910.215(b)(5), applied. He would not, however, amend the pleadings pursuant to Rule 15(b) of the Federal Rules of Civil Procedure to allege either a violation of the latter standard or a violation of 29 U.S.C. § 654(a)(1), because those violations had not been tried by the consent of the parties.

It is unnecessary to address the issue of whether the Judge erred in failing to amend because we find that the cited standard is applicable to the alleged hazard, whereas § 1910.215(b)(5) is not. Section 1910.215(b)(5) provides, in pertinent part, as follows:

"The maximum angular exposure of the grinding wheel periphery and sides for safety guards used on cutting-off machines . . . shall not exceed 150°."

The citation, however, pertains to the alleged inadequate guarding of "the point of operation of [a] radiac cutoff" machine. It is apparent that § 1910.215(b)(5) does not address a point of operation hazard.

Section 1910.215(b)(5) is derived from American National Standards Institute (ANSI) standard B7.1-1970, Safety Code for the Use, Care, and Protection of Abrasive Wheels. 29 C.F.R. § 1910.221. It is identical to its source standard found at § 4.33 of B7.1-1970, which describes the maximum exposure angles of surface grinders and cutting-off machines. As is indicated by the explanatory information accompanying B7.1-1970, the maximum exposure angles are designed to protect the operator from the flight of broken wheel pieces. It is clear, therefore, that the guards required by § 1910.215(b)(5) shield the periphery of the wheel to prevent contact

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with flying objects. They do not protect the operator from the hazards of contacting the point of operation, which is defined at 29 C.F.R. § 1910.212(a)(3)(i) as "the area on a machine where work is actually performed upon the material being processed." In other words, the point of operation is an actual contact point, the guarding of which will prevent actual physical contact.

Complainant has cited the appropriate standard for the alleged hazard. Respondent has, however, complied with the requirements of 29 C.F.R. § 1910.212(a)(3)(ii) by providing guards for the machine in question. That standard provides:

"The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle."

As we noted in Secretary v. Paccar, Inc., 17 OSAHRC 595, 597-598 (1975), with respect to a similar general machine guarding standard, the standard cited does not specify a particular type of guarding method. It does, however, require some means of protection against the point of operation hazard. As described in Judge Cronin's findings of fact numbers 14 and 15, the positioning of the safety guards and spacer device offered the necessary protection to satisfy the standard's requirements.

Citation number 7 alleged, and Judge Cronin held, that respondent had violated 29 U.S.C. § 654(a)(1), the Act's general duty requirement by operating a lathe which contained cracked jaws. The evidence indicates,

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however, and the Judge so found, that respondent had made numerous attempts, albeit unsuccessful, to locate the cracked jaws after the hazard was reported by union representatives. These numerous attempts establish that respondent's failure to correct the condition was not an act done voluntarily with either an intentional disregard of, or plain indifference to, the Act's requirements. Therefore, the violation is not willful within the meaning of the Act. Secretary v. Alpha Poster Service, Inc., OSAHRC Docket No. 7869, November 30, 1976; Secretary v. Craven Brothers and Company, OSAHRC Docket No. 2538, March 26, 1976.

We similarly agree with Judge Cronin that respondent's violation of § 1910.23(c)(1) (citation number 8) was not willful in nature. Respondent argued that the guardrail requirements of 1910.23(c)(1) did not apply to the top of the bake oven involved. In fact, the authorized representative of the Secretary of Labor who conducted the inspection in this case testified that respondent did not believe this area to be a platform within the meaning of the cited standard. We cannot say that respondent's view at the time of the violation charged herein was so unreasonable to the point of showing bad faith.^{3/} See Secretary v. Western Waterproofing Co., Inc., OSAHRC Docket No. 9225, February 24, 1977.

Our determination that respondent's failure to comply with 29 C.F.R. §

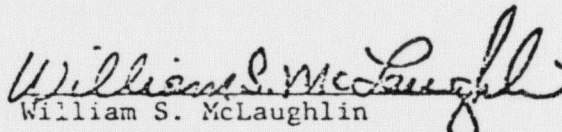
^{3/} Although in another case involving this respondent, Secretary v. General Electric Company, Inc., 17 OSAHRC 49, 68 (1975), we stated that the purpose of the Act would best be served by a broad construction of the term "platform", that decision was issued after the inspection in the instant case. We also stated therein that a willful violation could not be found where respondent dispute the standard's applicability in good faith. 17 OSAHRC at 73. We also note in this regard that respondent had installed railing along a portion of the top of the bake oven as a good faith gesture prior to the inspection involved herein.

Commission's Decision

1910.23(c)(1) resulted from a good faith dispute as to the standard's applicability is also dispositive of the issue regarding the repeated nature of the charge. In rejecting the Review Commission test of "repeatedly," which did not consider an employer's state of mind,^{4/} the United States Court of Appeals for the Third Circuit incorporated a "flaunting of the Act" requirement as proof for establishing a repeated violation,^{5/} as the Commission itself had done in Secretary v. General Electric Company, Inc., 17 OSAHRC 49 (1975). No such finding can be made on this record. Thus there was no error in the Judge's conclusion that the violation was not repeated.^{6/}

Accordingly, the Judge's decision is affirmed.

FOR THE COMMISSION


William S. McLaughlin
Executive Secretary

DATED: MAY 19 1977

^{4/} Secretary v. Bethlehem Steel Corporation, 20 OSAHRC 227 (1975).

^{5/} Bethlehem Steel Corporation v. OSAHRC and Brennan, 540 F.2d 157 (3d Cir. 1976).

^{6/} Because of our ruling on this issue, it is unnecessary to reconsider our previous holding in Secretary v. General Electric Company, Inc., *supra*, on the divisional accountability argument again raised by respondent, nor is it necessary to consider the union's res judicata/collateral estoppel argument in this regard.

Commission's Decision

BARNAKO, Chairman, Concurring:

I concur in the disposition of the citations alleging violations for failure to comply with 29 C.F.R. 1910.212(a)(3)(ii) and 309(a) for the reasons stated in the lead opinion. I further agree that the judge properly affirmed the remaining two citations.^{1/} However, in view of the nature of the case and in particular the arguments of the parties before us on review, I cannot join in the entirety of Commissioner Moran's discussion of the willful and repeated issues.

I particularly disagree with footnote 6 of Commissioner Moran's opinion. In the circumstances this case cannot be properly decided without consideration of the manner in which safety responsibility is delegated within Respondent's worksite, both generally and specifically on the facts of the case. While the pertinent evidence on this question is well stated in Judge Cronin's decision, I believe a brief summary will be helpful.

Both violations in issue occurred in the Small AC Motor Department (SAC), which is one of 64 separate operating departments at Respondent's worksite in Schenectady, New York. This complex consists of as many as 100 buildings at three different locations, the largest of which covers approximately 600 acres. Overall there are about 27,000 employees. The compliance officer himself considered it the second largest worksite in New York state.

Departments are included within divisions which in turn are organized into groups. SAC is part of the AC Motor and Generator Division. The safety responsibility is decentralized; each department manager has full

^{1/} Among other things, Respondent contends that the judge erred in finding that it had failed to comply with 29 U.S.C. 654(a)(1) and 29 C.F.R. 1910.23(c)(1). Assuming that this question is before us on review, I would affirm this portion of the judge's decision for the reasons he assigns.

I also note that these violations were alleged as willful and/or repeated but not as serious in nature. Nevertheless they were affirmed as serious violations. That disposition is not erroneous for the record plainly shows that the seriousness of the violations was tried by the consent of the parties. Todd Shipyards Corp., No. 8500, 5 OSHC 1012, 1016, 1976-77 OSHD para. 21,509 at 25,813 (R.C., Feb. 1, 1977) and cases cited therein.

Commission's Decision

safety responsibility within his department. Each supervisor including department managers is accountable and reports only to his immediate supervisor in a vertical fashion such that safety responsibility does not cross department or division boundaries. In SAC, this responsibility, including the responsibility to establish safety policy, has been delegated to Sweeney, the safety engineer, who testified that he would not consult as to safety policy with anyone outside his department. Keast, the union's safety consultant and former safety director, knew that each department had its own safety personnel and testified that he would discuss safety matters with the specific individual responsible.

Alleged Violation of 29 U.S.C. 654(a)(1)

As Judge Cronin found, Respondent made numerous attempts to locate the cracked jaws reported by the union safety representatives. Sweeney, as well as Dunbar, the acting superintendent of the building in which the lathe in question was located, and Rooney, SAC's manager of employee relations, all participated in these efforts, which included among other things discussion with a union shop steward, two lathe operators, and the assistant to the union's business agent whose duties include the negotiation and process of grievances.

On the facts as found I agree that a violative condition existed but that Respondent's failure to detect or correct the condition was not shown to be a conscious and deliberate act so as to be willful in nature. Western Waterproofing Company, No. 9225, 5 OSHC 1064, 1067, 1977-78 OSHD para. 21,572 at 25,382 (R.C. Feb. 24, 1977); Kennedy Construction, Inc., Nos. 9483 et al., 5 OSHC 1051, 1054-55, 1977-78 OSHD para. 21,550 at 25,862-63 (R.C., Feb. 15, 1977) and cases cited therein.

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Nevertheless the union argues that the violation is willful because Respondent "did not really" want to know where the jaws were located," and because it did not wish to establish communication with the union safety committee; in its view the judge erred in finding Respondent's efforts to be sincere. Its specific contentions in support of these conclusions are speculative and argumentative in nature; the record plainly is to the contrary.^{2/}

In this regard, the union contends that its conclusions are implicit in our prior decision involving this Respondent, General Electric Company, 17 OSAHRC 49, 3 OSHC 1031, 1974-75 OSHD para. 19,567 (1975), rev'd in part on other grounds, 540 F.2d 67 (2d Cir. 1976), which involved a previous inspection at the Steam-Turbine Generator Products Division of the Schenectady plant. In that case a divided Commission stated, among other things, that Respondent had not acted in good faith in that its safety officials failed to maintain direct contact with their union counterparts. We determined that one union official had overall safety responsibility; we found unrefuted his testimony that he understood Respondent had one central safety director. On the other hand, in the case now before us the issue of the corporate safety structure was thoroughly litigated; plainly the facts show not only that the responsible management personnel were involved but also that they in good faith intended to detect and eliminate the violative condition.^{3/}

^{2/} Specifically, the union asserts that management did not confer directly with the union safety committee. The facts are, however, that among other things the union safety director was informed that management had been unable to locate the cracked jaws.

^{3/} I was not a member of this Commission when the prior case was decided. Even assuming the factual context of the violations at issue in this case is similar, I would be reluctant to accept the union's argument in view of the labor-management relation overtones it necessarily raises. See 17 OSAHRC at 83-85 n.45, 3 OSHC 1051-52 n.6, 1974-75 OSHD para. 19,567 at 23,375-76 n.6 (dissenting opinion).

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Alleged Violation of 29 C.F.R. 1910.23(c)(1)

It is alleged that Respondent failed to guard the edge of a work platform about 11 feet high above dip and bake ovens thereby exposing maintenance employees to the hazard of a fall.^{4/} The facts as found by the judge show that prior to the inspection by the Department of Labor, the union reported an unguarded "catwalk" in the dip and bake area. Although a ladder provided access to the top of the ovens, Sweeney determined that the surface was not a platform requiring guardrails because it was only used for maintenance of the ovens as opposed to their operation and such use is infrequent. He reported his conclusion to Rooney, who in turn informed the union that in management's opinion no "catwalk" existed and that the standard had not been violated. However, it was agreed that a railing would be installed as a sign of good faith to the union.

Subsequently, a guardrail, midrail, and toeboard were installed along the length of a nonskid grating extending from the access ladder which in Sweeney's view constituted the "catwalk" reported by the union. The remainder of the edge was left unguarded, although maintenance work is performed within 18 inches of the edge in the unguarded area. However, when the union reinspected the building in question prior to Labor's inspection, it did not include the unguarded edge as an alleged violation in its follow-up report.

^{4/} This standard in pertinent part requires that "(e)very open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing . . . on all open sides" Section 1910.23(e)(1) provides that a "standard railing" consists of a top rail and intermediate rail; under certain conditions 1910.23(c)(1) also requires a toeboard. A "platform" is defined at 1910.21(a)(4) as a "(a) working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery and equipment."

Commission's Decision

Respondent did not contest previous citations alleging violations of this standard; those citations became final orders of the Commission prior to the inspection now in issue. We also affirmed a previous citation for violation of this standard in our prior decision which was issued subsequent to that inspection. The previous citations all concerned violations at departments other than SAC and indeed within a different division. As I have said, our prior decision also involved an entirely different division.

The record shows that the ovens are a part of Respondent's production operation and that their top surface is used for the performance of normal maintenance work incident to that operation. As we indicated prior to the inspection in this case guardrails are required in such circumstances.

Ventre Packing Company, 4 OSAHRC 544, 1 OSHC 1287, 1973-74 OSHD para. 16,475 (1973). See Weyerhaeuser Company, Nos. 1231 and 1758, 4 OSHC 1972, 1983-84, 1976-77 OSHD para. 21,465 at 25,756-58 (R.C., Jan. 3, 1977).

It is also clear, as both the Secretary and the union argue, that Respondent knew of the requirements of the standard, knew that the existing conditions did not comply with those requirements, and yet deliberately decided not to correct the conditions based on its own opinion that compliance was not necessary. Moreover, its opinion is contrary to the above-noted Commission precedent. I therefore do not agree that Respondent's belief can be characterized as reasonable. In the usual case, we would consider such conduct to constitute a willful violation. E.g., Western Waterproofing, ^{5/} supra, Kent Nowlin Construction, supra.

^{5/} Commissioner Moran reads Western Waterproofing simply to say that a good faith dispute as to a standard's applicability will negate willfulness. However, our statement was qualified; we indicated that there must be a legitimate basis for the difference in opinion. See 5 OSHC at 1076 n.8

Commission's Decision

However, this case is somewhat different from the usual. Notwithstanding Respondent's opinion it did install a standard railing and toeboard, albeit incompletely. And while its actions were inadequate to comply with the standard as to the entire work surface they did accord with Respondent's reasonable understanding of the scope of the union's complaint and thereafter the union appeared satisfied. In these circumstances I would not consider the violation willful. Williams Enterprises, Inc., No. 4533, 4 OSHC 1663, 1976-77 OSHD para. 21,071 (R.C., Sept. 8, 1976).

As to the question whether the violation is repeated in nature, the Secretary and the union ask that we find a repeated violation based on the fact of uncontested prior citations for violation of the same standard at the Schenectady complex as well as on the violation adjudicated in the prior case. In this regard, the union argues that our prior decision establishes as a matter of collateral estoppel or res judicata that the entire complex constitutes one worksite for purposes of determining repeated violations. Respondent, on the other hand, argues that the acts of this case are different and show a decentralized corporate structure so far as responsibility for decisionmaking is concerned.

5/ (continued)

and accompanying text, 1977-78 OSHD para. 21,572 at 25,882 and 25,885 n.8. The same may be said for our prior General Electric decision. There the question was whether the platforms in issue were governed by the general guardrail standard as cited or by the less stringent requirements of specific scaffolding standards and whether the cited standard applied to a product being manufactured. The Commission members who formed the majority in General Electric thereafter took divergent views when similar questions were presented in other cases. Compare General Electric, *supra*, with General Supply Co., No. 11752, 4 OSHC 2039, 1976-77 OSHD para. 21,503 (R.C., Jan. 25, 1977) and Allis-Chalmers Corp., 76 OSAHRC 50/F8, 4 BNA 1227, 1975-76 OSHD para. 20,666 (1976). On the other hand, the case now before us presents a different issue on which the Commission precedent is clear.

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Commission's Decision

Without addressing the parties' arguments Commissioner Moran joins Judge Cronin in strictly adopting a requirement that a subsequent violation be shown to have been committed with an actual intent to "flaunt" the requirements of the Act. He would vacate for failure to prove this element based solely on Respondent's supposed good faith belief that it need not comply.

For the reasons stated in my separate opinion in George Hyman Construction Company, No. 13559 (April 26, 1977), I do not agree that "flaunting" must be shown, nor do I agree that the test is one of the employer's actual mental state. Rather, in my view a repeated violation is established by proof of objective facts from which it can be inferred that the employer's conduct has been of such nature to constitute disregard of the Act's requirements. The circumstances must show that an employer who has committed a prior violation has failed to take appropriate steps to prevent recurrences of substantially similar violations.

Accordingly, I consider the realities of corporate control and decision making to be pertinent. The Secretary establishes a prima facie case that a violation is repeated, which the employer may rebut, when he shows that a violation which has been cited has become a final order and that a substantially similar violation occurs under the control of a supervisor who had responsibility for abating the first violation. The relevant level of supervision, moreover, will vary according to the nature of the violation. I would generally consider a local and transitory violation repeated only when the same first-line supervisor is responsible for the prior violation or violations, whereas if a violation is such to require the authority of a higher level of supervision for its correction, the Secretary may make his case by showing that both the initial and subsequent violations occurred

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within the area of responsibility of the higher level of supervision.

Applying these tests to the facts before us, I would conclude that the Secretary failed to establish his case. It is plain that the previous violations all occurred under front-line supervision different from that in this case. They also involve different higher levels of supervision because they occurred in other operating departments which are completely autonomous one from another so far as safety matters and in fact safety policy are concerned. Moreover, they occurred in different divisions which are unrelated on a still higher supervisory level.

In the circumstances, particularly considering the nature of the violation,^{6/} the evidence fails to show that the violation in issue had occurred within the control of the same supervisor with authority to abate the prior violations.

In view of what I have said, Respondent plainly is not estopped as the union argues from relitigating the question of its corporate safety structure. At the time when our prior decision was issued there was little case law concerning the proof necessary to show a repeated violation, and virtually the only guidance to employers was that presented by the Secretary's enforcement policy and Commission and court decisions concerning willful violations. Subsequent to that decision, the Commission members expressed their differing views on the nature of a repeated violation including my view that the allocation of supervisory responsibility in safety matters is of prime concern. George Hyman, supra. In such circumstances, the doctrine of collateral estoppel should not applied.

^{6/} Guardrail violations normally are easily corrected and without great expenditure. In the absence of evidence to the contrary, I would conclude that the unguarded open top could have been corrected at a relatively low supervisory level.

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Commission's Decision

As the Supreme Court has stated:

A taxpayer may secure a judicial determination of a particular tax matter, a matter which may recur without substantial variation for some years thereafter. But a subsequent modification of the significant facts or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes. . . . (Collateral estoppel) is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers. 7/

Clearly Respondent did not have a fair opportunity in the prior case to litigate the elements of a repeated violation as we subsequently defined them. See Scooper Dooper, Inc. v. Kraftko Corporation, 494 F.2d 840, 845 (3d Cir. 1974); Jones v. United States, 466 F.2d 131, 136 (10th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 459 n.8, 461 (5th Cir.), cert. denied, 404 U.S. 940 (1971). Accordingly, I would reject the union's argument and find the violation not repeated for the reasons I have given.

7/ Commissioner v. Sunnen, 333 U.S. 591, 599 (1948) (emphasis supplied).

Commission's Decision

CLEARY, Commissioner, CONCURRING IN PART AND DISSENTING IN PART:

I concur in vacating the citation alleging a failure to comply with 29 CFR §1910.309(a) for the reasons stated by the Judge. I dissent from the disposition of the other items. I would affirm citation No. 3 alleging a serious violation for failure to comply with 29 CFR §1910.212(a)(3)(ii). I would affirm citation No. 7 alleging a willful violation of section 5(a)(1) of the Act for using cracked jaws on a lathe. I would also affirm citation No. 8 as a repeated violation for failure to comply with 29 CFR §1910.23(c)(1).

I.

Citation No. 3 alleged noncompliance with §1926.212(a)(3)(ii) 8/ for failure to guard the point of operation of a radiac cutoff machine used to cut bundles of insulated wire three inches in diameter. I agree that §1910.212(a)(3)(ii) is the applicable standard. I disagree, however, with the majority's conclusion that the radiac cutoff machine was guarded in conformance with the standard's requirements.

8/ The standard reads:

§1910.212 General requirements for all machines.

(a) Machine guarding

* * *

(3) Point of operation guarding

* * *

- (ii) The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

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The cutting wheel of the radiac cutoff is housed in a hood-type guard that encloses about three-fourths of the wheel. The exposed portion is located directly in front of the operator. Between the operator and the cutting wheel is a movable work tray upon which the bundles of insulated wire to be cut are placed. The operator places her hands on each end of the wire bundles, and then slides the tray and bundles toward the cutting wheel. During the cutting operation, the operator's hands and fingers come as close as three inches from the exposed portion of the cutting wheel.

My colleagues rely on the Judge's findings of fact numbered 14 and 15 to support their conclusion that "the positioning of the safety guards and spacer device offered the necessary protection to satisfy the standard's requirements". I submit that the Judge's findings support precisely the opposite conclusion.

The Judge's finding of fact No. 14 simply states that three-quarters of the cutting wheel's periphery was enclosed, and that the portion remaining exposed was needed in order to perform the cutting operation on the wires. Finding of fact No. 15 reads:

A metal spacer device . . . was attached to the top lips of the work tray . . . at a point in front of, and in direct line with, the cutting wheel slot. This device is designed to provide some protection to an operator by indicating where he should place his hands during the cutting operation in order to avoid accidental physical contact with the cutting wheel A steel guard, with plexiglass insert, is affixed to the cut - off machine . . . and is positioned in direct line with the cutting wheel. This guard

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is designed to protect the operator's body and face from flying sparks, dust, and splinters created during the cutting operation. This guard, the work tray, and spacer device, all move towards the cutting wheel as one unit and remain in the same spatial relationship at the time the material is cut by the wheel
(transcript citations omitted) (emphasis added).

It is clear that the plexiglass insert was not intended to, and did not, serve as a point-of-operation guard. Nor does the "spacer bar", in front of which the operator's hands were placed, "prevent the operator from having any part of [her] body in the danger zone during the operating cycle," as is required by the standard. In fact, the Judge recognized that the hood enclosure, the plexiglass shield, and the spacer did not provide the protection required by the standard. In his finding of fact No. 16, he stated:

The guarding devices in use in October, 1974, provided some, but not complete protection against the point of operation hazard . . .
(emphasis added).

The majority ignores this finding. The supporting evidence shows that the operator of the radiac cutoff was not protected from the hazard of serious injury posed by the unguarded point of operation. 9/ The citation should therefore be affirmed.

II.

The majority affirms the Judge's conclusion that respondent violated section 5(a)(1) of the Act by permitting cracked "jaws" to be used in conjunction with the operation of a certain lathe. They refuse, however, to find that this violation was willful. I disagree.

9/ I agree with the statement in the union's brief that the adage that "pictures speak louder than words" is borne out in this instance. A reference to the photographs marked as the Secretary's exhibits S-4 and S-5 illustrates the error of the majority's holding that the operator was "protected" from the point of operation hazards involved.

Commission's Decision

The Secretary's inspection of respondent's facilities took place on October 4, 1974. During the course of this inspection, the compliance officers observed three cracked jaws on lathe No. 48620. It is not denied that this is the same lathe which the union's safety committee reported to respondent as early as August 1, 1974, as having three cracked jaws!

As the Judge correctly found, use of a cracked jaw could result in a failure which could cause fragments of the jaw to fly off from centrifugal force and seriously injure the lathe operator and nearby personnel. Nevertheless, more than two months after this serious safety hazard had been reported to the appropriate management personnel, the jaws remained in use, without having been examined adequately by respondent. My colleagues conclude, however, that because the management personnel to whom the hazard was reported made "numerous unsuccessful attempts" to locate the cracked jaws, the violation existing on the date of inspection cannot be considered willful. I do not agree.

The Commission has adopted the test for a "willful" violation set forth in Intercounty Constr. Co. v. O.S.H.R.C., 522 F.2d 777 (4th Cir. 1975), cert. denied, 96 S.Ct. 854 (1976). Kent Nowlin Constr., Inc., 5 BNA OSHC 1051, 1977-78 CCH OSHD para. 21,550 (Nos. 9483 et al., 1977). As stated in Intercounty, a violation is "willful" if it results from an intentional disregard of the Act or a plain indifference to its requirements, or if the employer knows that the actions taken might violate the Act. 522 F.2d at 780. In my view, it is also enough to show that the violation resulted

Commission's Decision

from a "reckless disregard" of a known hazard. Amulco Asphalt Co., 3 BNA OSHC 1396, 1975-76 OSHD para. 19,873 (No. 3258, 1975) (Cleary, Commissioner, dissenting).

I submit that the manner in which respondent's management representatives responded, or more precisely failed to respond, to the union's report of the cracked jaws can be fairly characterized as demonstrating "plain indifference" to, or "reckless disregard of, a serious hazard. That respondent was unable to determine with certainty in a two-month period whether three jaws on a specific lathe were or were not cracked, is incredible. As the Judge found, if respondent had used either of two known test procedures, "it could have easily located the jaws and determined that lathe No. 48620 was being operated with cracked jaws." 10/

III.

I agree that the violation for failure to comply with 29 CFR §1910.23(c)(1), concerning the inadequate guarding of the platform over the dip and bake ovens, cannot properly be found to be "willful" for the reasons stated in General Electric Co., 3 BNA OSHC 1031, 1974-75 CCH OSHD para. 19,567 (No. 2739, 1975), rev'd on other grounds, 504 F.2d 67 (2d Cir. 1976), decided subsequent to the issuance of the citation in this case.

I dissent, however, from my colleagues' refusal to find that the violation is "repeated". The Secretary established that respondent had been cited for prior violations of the cited standard at the Schenectady plant. These citations were not contested and become final Commission orders by

10/ Judge's Finding of Fact No. 31.

Commission's Decision

operation of law. Therefore, the proof in the instant case that respondent again violated the same standard at the same plant, is sufficient to establish a repeated violation although I would suggest supplementary briefing on the exact amount of an appropriate penalty. See my separate opinion in George Hyman Constr. Co., (No. 13559, April 26, 1977).

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APPENDIX A

Commission's Decision

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

GENERAL ELECTRIC COMPANY, INC.,

Respondent,

LOCAL NO. 301, INTERNATIONAL
UNION OF ELECTRICAL, RADIO AND
MACHINE WORKERS, AFL-CIO-CLC,Authorized
Employee
Representative.

DECISION AND ORDER

OSAHRC Docket No. 11344

Appearances:

For the Secretary of Labor
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Cronin, Judge, OSAHRC: This is a proceeding under Section 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq., hereafter called the Act) involving a safety inspection by the Secretary of Labor of Buildings 81, 85 and 89 at respondent's worksite, One River Road, Schenectady, New York on October 1, 2 and 4, 1974.

On November 18, 1974, the Secretary of Labor issued 18 citations and 3 Notifications of Proposed Penalty. Respondent's notice of contest to most, but not all, of the alleged violations and proposed penalties was received by the Secretary of Labor on December 12, 1974. After five days of hearing, and during a two-week recess, a settlement agreement with respect to all but four of the citations was reached by the parties. This agreement was approved by this Judge at the start of the proceedings on April 21, 1975 (Tr. 4-21). The authorized employee representative approved the settlement agreement, and withdrew its request to the Commission for "other appropriate relief" under Section 10(c) of the Act declaring that the respondent and

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authorized employee representative had agreed to discuss that matter separate and apart from this proceeding. The issues remaining involve four citations alleging five violative conditions.

Citation No. 3 alleges a "serious" violation of 29 C.F.R. §1910.212(a)(3)(ii) as follows:

"In building 81, Bay A18, the insulation and cutting department, the point of operation of the radiac cutoff was not guarded to prevent the operator from putting her hands into the point of operation while cutting insulation and other material."

Standard §1910.212(a)(3)(ii) as promulgated by the Secretary of Labor provides:

"(ii) The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle."

Citation No. 7 alleges a "willful" violation of Section 5(a)(1) of the Act as follows:

"The employer did not provide employment and a place of employment that was free from recognized hazards in that an employee was permitted to work with and was observed placing a piece of steel stock weighing approximately 350 pounds in a Warner and Swasey Lathe #48620, in building 89, Bay 33 East. Two of the four jaws used to hold the stock in place were cracked. Failure of one or both of the cracked jaws would subject the employee operating the lathe and other employees in the

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area to the hazard of the flying broken jaws or the flying piece of stock."

Section 5(a)(1) the Act (29 U.S.C. §654(a)(1)) provides:

"Sec. 5(a) Each employer --
(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;"

Citation No. 8, in pertinent part, alleges a "willful and/or repeated" violation of 29 C.F.R. §1910.23(c)(1) as follows:

"In building 81, Bay C18, a work platform 10' 11" above floor level over the dip and bake ovens was without a standard railing around the entire exposed edge to prevent the employees who perform maintenance on the motors and fans from falling over the exposed edge."

Standard §1910.23(c)(1) as promulgated by the Secretary of Labor provides:

"(c) Protection of open-sided floors, platforms, and runways. (1) Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a toeboard wherever, beneath the open sides,
(i) Persons can pass,
(ii) There is moving machinery, or
(iii) There is equipment with which falling materials could create a hazard."

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Citation No. 11 alleges a "willful and/or repeated" violation of Article 400-4(1) of the National Electrical Code, NFPA-70-1971 (hereafter N.E.C.) as adopted by 29 C.F.R. §1910.309(a) as follows:

"In building 81, Bay C8, stator index press area, flexible cord was used as a substitute for the fixed wiring of a structure as was observed in the connection of ten stator index presses by flexible cord run to the 550 volt electrical supply panel. With such use of flexible cord there is a chance of press operators receiving an electrical shock.

In building 81, Bay A17, insulation cutting and storage area, a fixed location Walker-Turner cutoff was connected by a flexible cord, plug, and receptacle rather than by fixed wiring. Such a means of hooking up a machine exposed the operator to the hazard of electrical shock."

Standard §1910.309(a) provides:

"(a) The requirements contained in the following articles and sections of the National Electrical Code, NFPA 70-1971; ANSI C1-1971 (Rev. of C1-1968) shall apply to all electrical installations and utilization equipment:

* * * * *

Sections:

400-3(a) and (b)	----- Flexible Cords and Cable, Uses.
400-4	----- Flexible Cords and Cable Prohibited."

* * * * *

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Article 400-4(1) of the National Electrical Code provides:

"400-4. Prohibited Uses. Except where installed in accordance with Article 645, flexible cord shall not be used (1) as a substitute for the fixed wiring of a structure; * * * * *

Article 400-3(a) of the National Electrical Code provides:

"400-3. Use. (a) Flexible cord may be used only for (1) pendants; (2) wiring of fixtures; (3) connection of portable lamps or appliances; (4) elevator cables; (5) wiring of cranes and hoists; (6) connection of stationary equipment to facilitate their frequent interchange; or (7) prevention of the transmission of noise or vibration; or (8) facilitating the removal or disconnection of fixed or stationary appliances for maintenance or repair."

The hearing concluded on April 24, 1975 and comprehensive post-hearing briefs were received from the parties on or before June 20, 1975.^{1/}

Proposed Findings of Fact

Upon the credible evidence of record, the following findings of fact are found:

1. The General Electric Company is a corporation organized under the laws of the State of New York and doing business in the State of New York. Various operating components of the General Electric Company maintain large manufacturing facilities at Schenectady, New York, encompassing

^{1/} The authorized employee representative furnished additional material subpoenaed, but not introduced, at hearing. This material was not considered or made a part of the hearing record.

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hundreds of acres and numerous buildings. There are approximately 27,000 persons employed at the Schenectady worksite by sixty-four (64) separate departments. (Tr. 61-63; 4/23-190, 191)

2. The organization of the General Electric Company is decentralized with responsibility and authority centered around product lines under the direction of a department general manager. Departments are then included within a division and divisions are included in groups (Tr. 4/24-64, 65).

3. No one person within the General Electric worksite at Schenectady has responsibility or authority over all of the operations of each division or department (Tr. 4/24-66, 67).

4. Within the General Electric worksite at Schenectady, no one department or division has overall authority or responsibility for safety. Such responsibility and authority lies with the individual department general manager and he, in turn, is responsible for safety only to his division general manager (Tr. 4/24-67, 68).

5. The Small AC Motor Department (hereinafter SAC) is a department of the General Electric Company and is located at the Schenectady worksite. SAC is part of the AC Motor and Generator Business Division (Tr. 4/22-305).

6. The General Manager of SAC has primary responsibility and authority for safety in SAC (Tr. 4/23-61, 139, 169).

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7. William Sweeney is employed as a Facilities Safety Engineer by SAC (Tr. 4/22-303). He has the prime responsibility for advising and counseling SAC on safety and compliance with the Act (Tr. 4/22-304). Mr. Sweeney establishes safety policies for SAC and in so doing does not receive direction from anyone outside of the department (Tr. 4/23-61, 62).

8. Following the June 21, 1974, safety inspection of SAC at Buildings 81, 85 and 89 by three members of Local 301, IUE, AFL-CIO (hereafter Union; one of the unions representing employees at the Schenectady worksite) a meeting was held with SAC management on August 1, 1974, at the request of the Union to discuss alleged violations based on this inspection (Tr. 4/21-70, 4/22-97).

9. As a result of an employee complaint to the Occupational Safety and Health Administration (hereafter OSHA) SAC was inspected by OSHA on October 1, 2 and 4 of 1974. The compliance officer was Mr. David Bernard, and he was accompanied by Mr. Lynnwood Taylor, a compliance officer in training (Tr. 86).

10. This inspection resulted in the issuance by OSHA of eighteen citations for alleged violations classified as non-serious, serious, willful and/or repeated, repeated, and willful (Tr. 89).

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11. None of the previous citations issued to respondent and relied upon by OSHA in classifying certain of the citations as "repeated" involved inspections of SAC (Tr. 4/22-307).

CITATION 3 (COMPLAINT PARAGRAPH VII,
SUBPARAGRAPH 2): POINT OF OPERATION
GUARDING-RADIAC CUT-OFF

12. During the Secretary of Labor's October, 1974, inspection of SAC, a respondent employee was observed cutting bundles of wiring insulation, approximately 3 inches in diameter, on a Radiac cutting-off machine. During the cutting operation, the employee's hands came within 3 to 6 inches of the cutting wheel (Tr. 212, 216, 287, 793; Exhibits S-4, S-5).

13. This employee has operated the machine for several years and has never been injured by the cutting wheel (Tr. 4/21-22, 23). Respondent's medical records do not indicate that any of the operators of this particular machine ever have been injured as a result of coming into contact with the cut-off wheel (Tr. 4/23-3, 4).

14. At the time of inspection, the Radiac cutting-off machine was provided with safety guards which covered approximately three-quarters of the cutting wheel's periphery; the angular exposure of the periphery did not exceed 90° and the existing degree of wheel exposure was necessary to perform the particular cutting operation (Tr. 212, 216, 287, 4/23-57; Exhibits S-4, S-5, R-17).

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15. A metal spacer device (marked Y on Exhibit R-17, and G-1 on Exhibit S-5) was attached to the top lip of the work tray (marked with Xs on Exhibit R-17) at a point in front of, and in direct line with, the cutting wheel slot. This device is designed to provide some protection to an operator by indicating where he should place his hands during the cutting operation in order to avoid accidental physical contact with the cutting wheel (Tr. 4/22-314-317, 4/23-46; Exhibit R-17). A steel guard, with plexiglass insert, is affixed to the cut-off machine (depicted on Exhibit R-17, and marked as G-2 on Exhibit S-5) and is positioned in direct line with the cutting wheel. This guard is designed to protect the operator's body and face from flying sparks, dust, and splinters created during the cutting operation. This guard, the work tray, and spacer device, all move towards the cutting wheel as one unit and remain in the same spatial relationship at the time the material is cut by the wheel (Tr. 4/23-47-50; Exhibit R-17).

16. The guarding devices in use in October, 1974, provided some, but not complete, protection against the point of operation hazard (Tr. 4/23-47-49).

17. Utilization of a hinge type guard that adjusts to the material during the cutting operation would provide no greater guarding protection to the operator at the time the actual cut is made than the guarding procedures in use on the Radiac cutting-off machine in October, 1974 (Tr. 4/23-174-177).

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18. If an operator's hands or fingers were to come into contact with the exposed wheel during the cutting operation amputation or severe abrasions could result (Tr. 217).

CITATION 7 (COMPLAINT PARAGRAPH IX,
SUBPARAGRAPH 4): GENERAL DUTY
VIOLATION-TURRET LATHE JAWS

19. During the safety inspection by Union representatives, Mr. Keast, Mr. Trinci, and Mr. Rafferty, on June 21, 1974, three jaws on the Warner and Swasey Turret Lathe Number 48620 were examined and appeared to have cracks (Tr. 4/21-100-101).

20. Based on its June 21 inspection, the Union prepared a report listing approximately 70 alleged safety violations and provided SAC management with a copy of this report on July 22, 1974. Most of the alleged violations involved Building 81 and no mention of the cracked jaws in Building 89 was made in this report (Tr. 4/21-99-100).

21. After SAC management obtained the July 22nd report, the items on the report were discussed and an immediate investigation undertaken by SAC management (Tr. 4/22-319-320). William Sweeney, SAC's Facilities Safety Engineer, personally investigated each item listed (Tr. 4/22-320-321).

22. At the meeting on August 1, 1974, between Union representatives and SAC management, SAC was notified by the Union that in Building #89, Frame 34, a Warner & Swasey Turret Lathe GE #48620 had three cracked jaws (Exhibit S-33, Attachment 8(b), Part 1).

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23. The plant was shut down during the first two full weeks of August, 1974, and in that period Mr. Sweeney went to lathe #48620 looking for cracked jaws. On that occasion there were no jaws in or on the lathe; only a set of jaws on an adjacent table, and he didn't observe any cracks in those jaws. He requested the foreman in charge during the shutdown to notify him if an operator of that lathe came into the plant. He later reported to Mat Rooney, a manager of SAC Union Relations that he was unable to find the jaws and asked whether they had the right machine (Tr. 4/23-12-13).

24. At a company-union information meeting which took place sometime after August 1, 1974, Mr. Rooney advised Ronald Baron, a union shop steward and an operator of lathe, #48620 that there were cracked jaws reported on the Warner & Swasey lathe in Building #89 "roughly in Mr. Lang's area." This description signified to Mr. Baron that his lathe was the one referenced. Mr. Rooney also asked Mr. Baron if he knew anything about it, and was told by Mr. Baron, "No" (Tr. 4/24-246-247).

25. Arthur Dunbar, Acting Superintendent of Building 89 during part of the summer of 1974, received from SAC management a list of alleged deficiencies found on a Union inspection. This list which was prepared by SAC made reference to cracked jaws on lathe #48620. He went and discussed the matter with Mr. Baron, the first shift operator

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of this lathe, and Mr. Joe Clason, the second shift operator. These discussions would have occurred sometime after the shutdown period and before August 29, 1974. Mr. Dunbar examined two or three sets of jaws and did not observe any cracks on them. Mr. Baron, after examining these jaws on the same occasion, indicated that he didn't think it was his machine that was involved. When Mr. Dunbar discussed the matter of cracked jaws with Mr. Clason on the second shift, Mr. Clason, after looking at the jaws, said he did not see any cracks. Mr. Dunbar also checked the jaws in the miscellaneous parts area located in another part of Building 89 and could not find any cracked jaws (Tr. 4/23-241-245). Following the Union reinspection on September 4, 1974 (at which time no jaws were located), Mr. Dunbar again visited lathe #48620 and examined jaws with Mr. Baron. At that time, Mr. Baron pointed out what appeared to Mr. Dunbar to be a scratch near one of the joints of a jaw and indicated to Mr. Dunbar that he did not believe it was a crack (Tr. 4/23-246-251, 4/24-259-260).

26. Following Mr. Dunbar's initial contact with Mr. Baron in August, 1974, Mr. Sweeney contacted Mr. Baron and told him that he was looking for cracked jaws and for him to be on the lookout for jaws with cracks in them. Mr. Baron did not point out to Mr. Sweeney any marks on the jaws (Tr. 4/24-259-260).

27. The next day, or several days after Mr. Sweeney's visit, Mr. Rooney again contacted Mr. Baron and said to him,

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"I want to find those broken jaws." In response, Mr. Baron led Mr. Rooney to believe the jaws in use "were not the jaws in question" (Tr. 4/24-261-262). In all, Mr. Baron had conversation with Mr. Rooney concerning the jaws four or five times during the summer of 1974 (Tr. 4/24-269-270).

28. Mr. Rooney called Mr. Martucci, the Assistant to the Union's Business Agent, on August 30th or September 1, 1974, and said SAC could not locate the broken jaws (Tr. 4/22-101).

29. The two jaws (Exhibit S-34) remained with, and were used on, lathe #48620 from 1968 to October 4, 1974. These particular jaws were in the same cracked condition from at least June 21, 1974 to October 4, 1974 (Tr. 4/21-125, 200; 4/24-244-245).

30. During the period from June 21, 1974, up until October 4, 1974, the Warner & Swasey lathe #48620 was operated frequently with these cracked jaws.

31. If SAC had utilized either Red Dye or Magnaflux test procedures on the three sets of jaws assigned for use on lathe #48620, it could have easily located the jaws and determined that lathe #48620 was being operated with cracked jaws (Tr. 4/23-92-95).

32. By failing to exercise reasonable diligence, respondent's SAC management permitted the use of cracked jaws on lathe #48620 without determining their suitability for continued service.

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33. Use of a cracked jaw of the configuration of Exhibit S-34, whatever the cause of the cracks, could result in catastrophic failure (Tr. 4/24-33, 34, 39). In the event of a catastrophic failure, a piece of the jaw could fly off and seriously injure the lathe operator and any nearby personnel (Tr. 284, 4/24-34; 4/24-235-237).

34. The evidence was insufficient to establish that the cracked jaws (S-34) would have failed catastrophically if their use on lathe #48620 had continued after October 4, 1974 (Tr. 4/24-58, 89, 91, 117, 126, 127, 165, 166, 171, 173, 174, 226).

35. A cracked jaw of the configuration of Exhibit S-34 may not fail catastrophically but the respondent recognizes that the use of a cracked jaw without determining with reasonable certainty its suitability for further service is a hazardous practice that reasonably could be expected to result in serious physical harm to its employees (Tr. 4/21-101, 105, 107; 4/23-70, 72-73, 97-98, 187-190; 4/24-180, 186-187, 197-198, 210-213, 223, 244).

36. Although ineffective and inadequate, the numerous attempts by SAC management to find the cracked jaws in use on lathe #48620 establish that respondent did not intentionally, deliberately, or consciously permit the use of cracked jaws.

CITATION 8, PARAGRAPH 1 (COMPLAINT
PARAGRAPH XI, SUBPARAGRAPH 1, FIRST
SENTENCE): WORK PLATFORM - TOP OF
BAKE OVEN

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37. The area cited as a violation of 29 C.F.R. §1910.23(c)(1) is the top of a bake oven approximately 10 feet 8 inches above a concrete floor where two motors and related equipment necessary to operate the oven are located (Tr. 996-997).

38. Access to the motors is by means of a permanently affixed ladder on the right side of the oven. This ladder leads to a section of non-skid grating which extends six feet north, away from the ladder. On the day of inspection, the length of this grating was guarded with a rail and toeboard (4/23-35-36). One of the motors is adjacent to this railing; the other motor is 10 to 14 feet from the end of railing (Tr. 335-336).

39. These circulation and exhaust motors require occasional maintenance by electricians and structural steel workers, including the installation of new belts and bearings, and the electrical disconnection of the motors. During the year preceding October 1, 1974, a structural steel worker, Mr. Anthony Perrone, had been on top of the oven four times. One of these occasions was in August, 1974, when he installed a six foot railing along a "cat walk." He has not been on the oven since the railing was installed (Tr. 4/22-114-115). When working on the back motor, he is positioned 4 feet from the edge of the oven top, and 1 foot from the edge when working on the front motor (Tr. 4/22-114-119).

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40. Prior to October, 1974 maintenance men were provided with no protection whatsoever from falling from the top of the oven when working on the motors except on the side adjacent to one motor where the railing was installed in August, 1974. Mr. Sweeney had seen maintenance employees on top of the oven prior to October, 1974 (Tr. 4/22-116; 4/13-105).

41. If an employee were to fall off the oven, he could suffer serious physical injury.

42. The July 22nd report of the Union's June 21, 1974 inspection referred to an unguarded "catwalk," ten feet eight inches above the floor in the Dip and Bake area (Exhibit S-33, Attachment 8a, Page 2). At a subsequent meeting on August 1, 1974, SAC management responded that in its opinion the top of the oven was not a "catwalk" and need not be railed (Exhibit S-33, Attachment 8b, Part II, Page 3).

43. Subsequently, on August 29th and September 5, 1974, SAC officials notified the Union that they had railed the portion of the oven top that could be construed as a "catwalk" on a good faith basis even though they did not consider this to be a platform (Tr. 4/21-95; 4/22-100; Exhibit S-44, Attachment 8b, Part IV).

44. The "catwalk" was railed prior to August 29, 1974, and failure to install a railing on the top of the oven was not included as an alleged violation in the Union's

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report of its reinspection of Buildings 81, 85 and 89 on September 4, 1974 (Tr. 4/21-96; Exhibit S-33, Attachment 4).

45. During the Secretary of Labor's inspection in October, 1974, the respondent's representatives told Officer Bernard that they did not view the top of the oven as a work platform within the meaning of the standard. He believed that this determination was a good faith determination on behalf of respondent's representatives (Tr. 1036-1037).

CITATION 11, PARAGRAPH 1 (COMPLAINT
PARAGRAPH XI, SUBPARAGRAPH 4, FIRST
SENTENCE): WIRING OF TEN STATOR
INDEX PRESSES

46. Officer Bernard observed ten stator index presses connected to a 550 volt electrical supply panel by means of flexible cord in horizontal runs of 10 to 30 feet in length (Tr. 468-474; Exhibit S-17). This wiring was in "good, physical condition" and contained no abrasions (Tr. 1216, 1218, 4/22-167, 271; 4/23-39).

47. Article 400-3(a) of the N.E.C. permits the use of flexible cord to prevent the transmission of machine noise or vibration (Tr. 1225; 4/22-36-37; 4/23-195, 214, 223; 4/24-134, 140).

48. These stator index presses vibrate, and a "great deal" of noise emanates from them (Tr. 1226; 4/21-266). The horizontal runs of flexible cord were used to prevent transmission of noise and vibration and were not used as

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substitutes for the fixed wiring of a structure (Tr. 4/23-194-195, 222-223).

49. The Secretary's position is that use of flexible wiring in a horizontal position to connect stationary machinery, for whatever reason, is a violation of Article 400-4(1) of the N.E.C. (Tr. 4/21-44-45; 4/23-232).

50. The N.E.C. does not prohibit the use of flexible cord in the horizontal position to prevent the transmission of vibration or noise nor does it specify the maximum length of flexible cord that may be used for these purposes (Tr. 4/21-262; 4/22-59; 4/23-195, 197, 223-224; 4/24-134).

51. There are no cranes positioned directly overhead these index presses (Tr. 4/23-40), and forklift trucks do not come within three feet of this flexible cord (Tr. 4/23-41).

52. A preferable, logical, and more functional wiring system would be to use vertical pendants off an overhead, horizontal, conduit system (Tr. 4/23-202-207).

53. The flexible cord wiring system connecting the stator index presses in October, 1974 did not constitute a recognized hazard likely to result in death or serious physical harm.

CITATION 11, PARAGRAPH 2 (COMPLAINT
PARAGRAPH XI, SUBPARAGRAPH 4, SECOND
SENTENCE): WIRING OF WALKER-TURNER
CUTOFF

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54. The respondent's Walker-Turner cutoff machine was connected to an electrical power source outlet by means of its own flexible cord with a three prong plug attachment. Lengthwise, this flexible cord measured 18 to 24 inches (Tr. 476-477, 1206; 4/23-42).

55. This flexible cord was not used as a substitute for the fixed wiring of a structure (Tr. 4/23-197-198, 224-225).

Discussion

A. As to Violations

Vacation of Citation 3 is required. The Secretary elected to proceed under 29 C.F.R. §1910.212(a)(3)(ii) for respondent's alleged failure to adequately guard the Radiac Cutoff's point of operation. But this standard's language makes plain that its general requirement concerning point of operation guarding for all machines is inoperative and inapplicable to any machine whenever another existing standard sets forth specific requirements for guarding that machine's point of operation. After directing the guarding of points of operation, the standard further provides that the guarding devices used for this purpose must conform " * * * with any appropriate standards therefor, or, in the absence of applicable specific standards * * *" the guarding devices used must prevent the operator from having any part of his body in the danger zone during the operating cycle.

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Essentially, this standard restates and incorporates the precept contained in 29 C.F.R. §1910.5(c)(1) which, in pertinent part, provides:

"If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition practice, means, method, operation, or process."

The Radiac Cutoff is a cutting-off machine and, therefore, the provisions under §1910.215 (particularly §1910.215(b)(5) which details the requirements for guarding a wheel's periphery on a cutting-off machine) govern as a matter of law and render the general provisions of §1910.212(a)(3)(ii) inapplicable. See Secretary v. Tennsco Corporation, 4 OSAHRC 726 (Docket No. 1895); Secretary v. Isaacson Structural Steel Company, 5 OSAHRC 654 (Docket No. 1906); Secretary v. Brown-Jordan Company, 7 OSAHRC 25 (Docket No. 3982).

Respondent's contention that the citation must be vacated because the cited regulation is inapplicable to cutting-off machines was raised for the first time in its brief. The Commission previously has held, however, that whether a cited standard applies to the facts of a particular case as a matter of law is a question of "subject matter jurisdiction" which can be raised at any point in the proceeding. Secretary v. Stevens Equipment Co., 2

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OSAHRC 1501 (Docket No. 1060); accord, Secretary v. Brown-Jordan Company, supra.

Photographic Exhibits S-4, S-5 and R-17 tend to indicate that respondent may have been in violation of §1910.215(b)(5) because the wheel exposure appears to begin at a point even with, or slightly above, the horizontal plane of the wheel's spindle instead of at a point not less than 15° below said horizontal plane. But all of the evidence, including these exhibits, was relevant to prove or disprove respondent's violation of §1910.212(a)(3)(ii); and there was no indication during the hearing that the Secretary was seeking to raise the issue of respondent's possible violation of §1910.215(b)(5) or that respondent was consenting to the trial of that issue. On this record, therefore, the citation and complaint will not be deemed amended under Rule 15(b) of the Federal Rules of Civil Procedure to charge respondent with a violation of §1910.215(b)(5).

A "serious" violation of 29 U.S.C. §654(a)(1) (Section 5(a)(1) of the Act) is found.

The evidence establishes that a crack in a turret lathe jaw may well propagate to a point where the jaw will fail in a manner that could result in serious physical injury; and it also establishes that one can determine with reasonable certainty when that point will be reached by applying the science of fracture mechanics. From these facts it must be concluded that the use of a cracked turret

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lathe jaw without determining its suitability for continued service is a hazardous practice that reasonably can be expected to cause death or serious physical injury.

Although the Secretary did not establish whether this hazardous practice is "recognized" by the industry of which respondent is a part, the record clearly reflects that respondent itself recognizes the practice as hazardous.

In failing to take reasonable precautionary steps during the period from August 1, 1974 to October 4, 1974 to prevent the use of untested cracked jaws, the respondent did not furnish its operators of the Warner and Swasey lathe #48620 a place of employment free from a "recognized" hazard.

Although placed on notice August 1, 1974 by the Union that cracked jaws were in use on lathe #48620, respondent did not exercise reasonable diligence to locate them. At the most there were 3 sets, or 12 jaws in all, assigned to that lathe, and by the application of simple test procedures, readily available to SAC, confirmation of the cracks' existence could have been obtained. The cracked jaws then could have been removed from service, and either discarded, or subjected to an appropriate fracture mechanics analysis to determine their suitability.

Simply because the evidence does not support a finding that the two cracked jaws were unsuitable for continued use on lathe #48620 does not excuse respondent's failure to remove them from service until an appropriate evaluation could be

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undertaken. The relevant issues here are whether using cracked jaws without testing constitutes a hazardous practice and whether respondent recognizes the practice as hazardous; not whether these particular jaws were in any danger of catastrophic failure. See, Peter J. Brennan v. Occupational Safety and Health Review Commission, & Vy Lactos Laboratories, Inc., 494 F.2d 460 (8th Cir. 1974).

The record supports a finding of "serious" violation but does not establish that respondent "willfully" violated 29 U.S.C. §654(a)(1). Unquestionably, respondent's supervisory personnel failed to exercise reasonable diligence, but their numerous and apparently sincere efforts to locate the jaws, however ineffectual, preclude a finding that they knowingly, consciously and deliberately permitted the continued use of the cracked jaws.

Respondent contends that the top of the oven in Building 81, Bay C18 is not a "platform" within the meaning of §1910.21(a)(4), and therefore, not subject to the railing requirements of §1910.23(c)(1).

It reasonably may be argued that §1910.23(c)(1) should be interpreted to apply only to elevated working spaces, 4 feet or above ground level, which are designed primarily for the operation of machinery and equipment and which require employee presence on a predictable and regular basis; and not to spaces where only occasional maintenance

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or repair work is performed. A majority of the Commission, however, has adopted a much more liberal, less restrictive, interpretation of the standard. Rather than applying the maxim of noscitur a sociis to the general definition of "platform" contained in §1910.21(a)(4) which would have produced a much narrower construction, the Commission in Secretary v. General Electric Company, Inc., supra (Docket 2739), gave the broadest possible meaning to the term "platform." Although not expressly defining "platform" the majority's opinion suggests that an elevated area on any structure constitutes a platform whenever work is required to be performed thereon and sufficient protection from an existing falling hazard is not provided.

The lower step of the oven top was designed to serve a dual function; to enclose the oven and to provide a location for the oven's motors and associated equipment. Although respondent's personnel are not required to go on top of this surface to operate the equipment, occasional maintenance and repair work is required and the manufacturer affixed a permanent ladder on the oven's side to provide access to the equipment. The evidence further establishes that maintenance workmen have gone on this platform without any protection from falling. Applying the rationale of the Commission in the General Electric case, supra, to these facts, we are constrained to hold that the lower step of the oven top constitutes a "platform" as that word is defined in

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§1910.21(a)(4) and is therefore subject to the railing requirements of §1910.21.

A more difficult question is: When did the violation occur? The facts relevant to this issue are substantially similar to those forming the basis of an alleged violation of §1910.23(c)(1) in Docket No. 2739. No maintenance employees were observed on the oven top at the time of inspection and, with the exception involving the installation of the "catwalk" railing in August 1974, there is no proof of an employee's actual presence near the motors during the six-month period prior to issuance of the citation on November 18, 1974. Their potential exposure to the hazard area, however, was constant; not only was the area accessible to maintenance employees, but more importantly, their assigned duties could reasonably be expected to bring them within the hazard area at any time. See, Brennan v. OSAHRC & Underhill Construction Corp., Nos. 74-1568 & 74-1579 (2d Cir. March 10, 1975). While recognizing that respondent eliminated part of the hazard in August, 1974 its complete elimination had not been accomplished by the time of inspection. Therefore, respondent will be held to have been in "serious" violation of §1910.23(c)(1) in October 1974.

The violation is considered "serious" because the possibility of a fall existed and serious physical injury could have resulted. The record, however, does not support a

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finding that respondent committed this particular violation either "willfully or repeatedly" within the meaning of section 17(a) of the Act.

The compliance officer conceded that respondent disputed the applicability of §1910.23(c)(1) in good faith and the Commission, in the General Electric case, supra, (Docket No. 2739), held that a violation of §1910.23(c)(1) was not willful because "General Electric disputed the applicability of this standard in good faith."

The Secretary's evidence on the "repeated" issue was limited to establishing that prior citations issued to respondent alleging violations of §1910.23(c)(1) have become final orders of the Commission. In the same General Electric case, however, the Commission held that "[t]he term 'repeated' is, therefore, read to mean happening more than once in a manner which flaunts the requirements of the Act." To establish that element, a clear case of an employer's neglect or utter disregard of his compliance responsibilities with respect to the particular standard must be proven. That was not done here, and respondent's good faith difference of opinion concerning the standard's applicability precludes a finding that the October, 1974 violation was committed "in a manner which flaunts the requirements of the Act."

Because of the disposition of the "willful" and "repeated" allegations, it becomes unnecessary to resolve

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the issue of whether the Act permits a charge of "willful and/or repeated" violation.

The record establishes, by a preponderance of the evidence, that the horizontal runs of flexible cord connecting the ten stator index presses were used by respondent to prevent the transmission of noise and vibration. Also, neither the flexible wiring of the index presses nor the Walker-Turner's 24 inch flexible cord were shown to have been used as substitutes for the fixed wiring of the building's structure.

The Secretary insists that flexible cords cannot be used horizontally to connect stationary machinery in order to prevent the transmission of noise or vibration. We disagree because the N.E.C. specifically permits the use of flexible cord for these purposes and does not expressly, or by implication, prohibit its use horizontally. In our opinion, respondent's flexible wiring system at the index presses in October 1974 was in compliance with the N.E.C. although, obviously, it did not conform with preferable, modern day, electrical engineering practices.

At the close of the hearing, the Secretary's representative moved to amend his pleadings to allege in the alternative a general duty violation (29 U.S.C. §654(a)(1) (Tr. 4/24-306). But no violation of 29 U.S.C. §654(a)(1) can be found as a matter of law on this record.

Commission's Decision

The Secretary proceeded on the sole theory that a violation of N.E.C. had been committed due to respondent's use of horizontal flexible wiring to connect stationary machinery and its use of flexible cord to connect the Walker-Turner. Respondent has been found in compliance with the N.E.C. with respect to those issues and therefore, by operation of 29 C.F.R. §1910.5(f), must be "deemed to be in compliance with the requirement of Section 5(a)(1) of the Act" for the same conditions.

Even assuming arguendo that the parties consented to the trial of whether or not respondent was in violation of the general duty clause, no violation was established. The flexible cord wiring systems were not proven defective, and were not exposed to the hazard of being struck by any external forces. Clearly, there was insufficient record evidence to establish that the particular wiring systems in use at the index presses and Walker-Turner created any hazards.

B. As to Penalty

Section 17(j) of the Act requires that due consideration must be given to the size of an employer's business, the gravity of the violations, employer's good faith, and past history of previous violations under the Act, in assessing civil penalties.

Respondent's establishment at Schenectady, New York is large, employing 27,000 employees and it has a past history of numerous violations under the Act.

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On this record, the likelihood of an accident resulting from respondent's use of the particular set of cracked jaws, or from its failure to provide sufficient protection from falling off the oventop, was proven to be slight. Also, respondent did exhibit some good faith by trying to locate the cracked jaws and by installing a partial railing. However, it is believed that penalties sufficient to deter similar violations in the future are warranted. A penalty of \$500 for each of these "serious" violations is considered appropriate.

Conclusions of Law

1. The respondent is an employer in a business affecting commerce within the meaning of section 3(5) of the Act and obliged to comply with those standards promulgated under Part 1910, Title 29, of the Code of Federal Regulations.
2. The provisions of section 29 C.F.R. §1910.212(a)(3)(ii) relate to general requirements for point of operation guarding on all machines, whereas the specific requirements for point of operation guarding for cutting-off machines are set forth under 29 C.F.R. §1910.215.
3. By operation of section 29 C.F.R. §1910.5(c)(1) the requirements of section §1910.212(a)(3)(ii) relating to point of operation guarding are inoperative and inapplicable as a matter of law to point of operation guarding on cutting-off machines.
4. The respondent on October 4, 1974 was in "serious" violation of 29 U.S.C. §654(a)(1) for permitting the use of

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cracked lathe jaws from August 1, 1974 to October 4, 1974 without determining their suitability for continued use.

5. A penalty of \$500 for respondent's violation of 29 U.S.C. §654(a)(1) is appropriate.

6. The lower step of the top of a bake oven is a "platform" as that term is used in 29 C.F.R. §1910.23(c)(1).

7. In October, 1974, respondent was in "serious" violation of §1910.23(c)(1) by not providing on the lower step of the oven top a standard railing, or equivalent protection, to eliminate a potential falling hazard.

8. Respondent's October, 1974, violation of §1910.23(c)(1) was not "repeated" because it was not done in a manner which flaunts the requirements of the Act.

9. A penalty of \$500 for respondent's violation of §1910.23(c)(1) is appropriate.

10. The violations of 29 U.S.C. §654(a)(1) and §1910.23(c)(1) were not committed "willfully" within the meaning of Section 17(a) of the Act.

11. The flexible cord wiring systems used to connect the stator index presses and Walker-Turner cutoff machine in October, 1974 were in compliance with the National Electrical Code.

12. By operation of 29 C.F.R. §1910.5(f) the respondent's use of the flexible cord wiring systems to connect the stator index presses and Walker-Turner cutoff

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machine is deemed to be in compliance with the requirements of Section 5(a)(1) of the Act (29 U.S.C. §654(a)(1)) as a matter of law.

13. The respondent was not in violation of 29 U.S.C. §654(a)(1) in October, 1974.

ORDER

Based on the settlement agreement, findings of fact, conclusions of law and the entire record, it is ORDERED:

1. Items 1, 3, 5, 6, 7, 10, 11 and 12 of Citation 1, issued November 18, 1974 are hereby AFFIRMED. Penalties of \$60.00 for item 1; \$50.00 for item 6; \$75.00 for item 10; and \$50.00 for item 12, are hereby ASSESSED.

2. Citation No. 2, issued November 18, 1974, is hereby AFFIRMED and a penalty of \$900.00 ASSESSED.

3. Citation No. 3, issued November 18, 1974, and any proposed penalty based thereon, is hereby VACATED.

4. A non-serious violation of §1910.212(b) (Citation No. 5) is hereby AFFIRMED and a penalty of \$50.00 ASSESSED.

5. A non-serious violation of §1910.309(a) (Citation No. 6) is hereby AFFIRMED and a penalty of \$100.00 ASSESSED.

6. A "serious" violation of Section 5(a)(1) of the Act (29 U.S.C. §654(a)(1) (Citation No. 7) is hereby AFFIRMED and a penalty of \$500.00 ASSESSED.

Commission's Decision

7. A "serious" violation of §1910.23(c)(1) (paragraph one of Citation No. 8) is hereby AFFIRMED and a penalty of \$500.00 ASSESSED.

8. A non-serious violation of §1910.23(c)(1) (paragraph two of Citation No. 8) is hereby AFFIRMED, but no penalty ASSESSED.

9. A non-serious violation of §1910.176(b) (Citation No. 9) is hereby AFFIRMED, and a penalty of \$200.00 ASSESSED.

10. A "serious" violation of §1910.309(a), Article 110-17(a) of the National Electrical Code (Citation No. 10) is hereby AFFIRMED, and a penalty of \$500.00 ASSESSED.

11. Citation No. 11, issued November 18, 1974, and any proposed penalty based thereon, is hereby VACATED.

12. A non-serious violation of §1910.22(a)(1) (Citation No. 12) is hereby AFFIRMED, and a penalty of \$50.00 ASSESSED.

13. Citation No. 13, issued November 18, 1974, and any proposed penalty based thereon, is hereby VACATED.

14. A "serious" violation of §1910.133(a)(1) (Citation No. 14) is hereby AFFIRMED, and a penalty of \$900.00 ASSESSED.

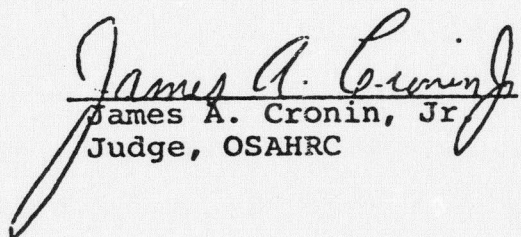
15. A non-serious violation of §1910.176(c) (Citation No. 15) is hereby AFFIRMED, and a penalty of \$50.00 ASSESSED.

Commission's Decision

16. A non-serious violation of §1910.212(a)(1) (Citation No. 16) is hereby AFFIRMED, and a penalty of \$50.00 ASSESSED.

17. A non-serious violation of §1910.157(a)(2) (Citation No. 17) is hereby AFFIRMED, and a penalty of \$50.00 ASSESSED.

18. A non-serious violation of §1910.252(b)(4) (ii)(c) (Citation No. 18) is hereby AFFIRMED, and a penalty of \$50.00 ASSESSED.


James A. Cronin, Jr.
Judge, OSAHRC

Dated: August 6, 1975

254a
Petition for Review

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- X
GENERAL ELECTRIC COMPANY, :
 :
Petitioner, :
 :
-against- : PETITION
 : FOR REVIEW
OCCUPATIONAL SAFETY AND HEALTH :
REVIEW COMMISSION, :
 :
Respondent. :
 :
----- X

General Electric Company hereby petitions the Court for review of so much of the Order of the Occupational Safety and Health Review Commission issued on May 19, 1977 in Secretary of Labor v. General Electric Company, OSAHRC Docket No. 11344, as held that the Company committed a "serious" violation of 29 CFR Part 1910.23(c)(1) (bake oven) and, in connection therewith, assessed a penalty of \$500.00.

Dated: New York, New York
July 18, 1977

ARANOW BRODSKY BOHLINGER
BENETAR & EINHORN

By Stanley Selig
A Member of the Firm
Attorneys for General Electric
Company
469 Fifth Avenue
New York, New York 10017
212-889-1470

and

ROLAND C. RADICE
General Electric Company
1 River Road
Schenectady, New York 12305
518-393-1430

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Joseph Boselli , being duly sworn, deposes

and says, that on the 18 day of Oct 19 77 , at 11 o'clock

A.M. he served the annexed Joint Appendix No. 77-4137 in Re:
General Electric Co. vs. Occupational Safety & Health Review
Commission

upon 1. Carin A. Clauss
2. Allen Sachsel

Esq(s) , Attorney(s)

for Respondent

by depositing 1 true copies

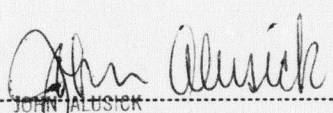
thereof in a Post Office Box regularly maintained by the Government
of the United States and under the care of the Postmaster of the
City of New York at Village Station, New York, N. Y. 10014, enclosed
in a securely closed wrapper with the postage thereon prepaid, ad-
dressed to said attorney(s) at (his/their) office

1. Solicitor of Labor
U.S. Dept of Labor
200 Constitution Ave., NW
Washington, D.C. 20210
2. U.S. Dept of Justice
Civil Div - Appellate Sec
10th & Pennsylvania Ave., NW
Washington, D.C. 20530

that being the address designated in the last papers served herein by
the said attorney.

Sworn to before me this 18th

day of October 19 77



JOHN ALUSICK
Notary Public, State of New York
No. 31-4602133
Qualified in New York County
Commission Expires March 30, 1978